

IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA           )  
  )  
  )  
VS.                                        ) CRIMINAL ACTION NO.  
  ) B-18-CR-8  
  )  
RODNEY MESQUIAS, HENRY            )  
MCINNIS AND FRANCISCO PENA        )  
  )

TRIAL - DAY ELEVEN  
BEFORE THE HONORABLE ROLANDO OLVERA  
NOVEMBER 5, 2019

A P P E A R A N C E S

FOR THE UNITED STATES:

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1 THE COURT: Thank you, everyone. Please be  
2 seated.

3 Gentleman, it's my understanding there are  
4 some issues that have to be taken up outside the  
5 presence of the jury?

6 Mr. Swartz?

7 MR. SWARTZ: Yes, Your Honor. Just very  
8 briefly, Your Honor.

9 After our charge conference from yesterday,  
10 we went back over the final version of the jury charge.  
11 I noticed that after we put in some additional  
12 information about the money laundering conspiracy charge  
13 there was, basically, now a duplicative unanimity  
14 section. I've discussed that with counsel for  
15 Mr. Mesquias and so we are in agreement that the  
16 unanimity section should be taken out, the duplicative  
17 one. We've gone over that with your able clerk and we  
18 believe that -- that portion has now been corrected.

19 THE COURT: That paragraph has been deleted?

20 MR. SWARTZ: Yes, Your Honor.

21 THE COURT: All right.

22 MR. SWARTZ: There's two paragraphs on page  
23 19 that were deleted.

24 THE COURT: Very good. Parties agreed to  
25 it, right, Mr. Canales?

1 MR. TONY CANALES: Yes, Your Honor. That's  
2 from jury pattern -- pattern jury charge 1.25. We  
3 believe it's been repeated before in the definition of  
4 money laundering so we have no objection to it.

5 On a different matter, Your Honor.

6 THE COURT: Anything else?

7 MR. TONY CANALES: Yes, Your Honor.

8 Just for the record, Your Honor, yesterday  
9 I -- in my discussions, I just would like to be able to  
10 clarify that my request for instructions 12, 13 -- 12,  
11 13, 14 -- 12, 13 and 15, I think the Court informed me  
12 that you were going to issue an order declining them,  
13 but I didn't have the order. I need to have an order  
14 from the Court saying you're -- you're declining these  
15 particular instructions.

16 THE COURT: Yes, if they're -- these are  
17 objections that you did not present yesterday?

18 MR. TONY CANALES: No, I did present them,  
19 they were -- they were not objections -- they were  
20 objections in the form that you did not include them in  
21 the jury charge.

22 THE COURT: Correct.

23 MR. TONY CANALES: I said they should have  
24 been included in the jury charge so, therefore, I submit  
25 to the Court that portion that you have to have -- you

1 have to enter an order saying denied on these particular  
2 ones.

3 THE COURT: All right. Well, I -- I just  
4 want to be clear, did I already overrule the objection  
5 or --

6 MR. TONY CANALES: I don't think you did, so  
7 that's my --

8 THE COURT: All right. Well, let's go  
9 through --

10 MR. SWARTZ: My recollection, Your Honor, is  
11 that the Court did overrule them, but if we need to make  
12 the record clear, that's fine.

13 THE COURT: Out of an abundance of caution,  
14 you said it was 12, 13 and 15?

15 MR. TONY CANALES: Yeah, 12, 13, yeah, and  
16 15, Your Honor.

17 THE COURT: All right. Your objection as to  
18 12, 13 and 15 are overruled.

19 MR. TONY CANALES: Thank you, Your Honor.

20 THE COURT: If I haven't already done so.  
21 All right. Anything else?

22 MR. SWARTZ: No, Your Honor, thank you.

23 THE COURT: All right. Gentlemen --

24 MR. SWARTZ: Your Honor, I -- forgive me. I  
25 believe we do need to still test the sound for our power

1 points, if we could do that just before the jury comes  
2 in.

3 THE COURT: Gentlemen, you'll have plenty of  
4 time while I read our work product, but please proceed.

5 MR. SWARTZ: Thank you.

6 THE COURT: And gentlemen, remind me as to  
7 how you want to split up your direct, closing and  
8 rebuttal closing in terms of timeframe?

9 MR. FOSTER: Thank you, Your Honor.

10 I'll take, approximately, an hour to close  
11 and Mr. Lowell will take, approximately, a half-hour for  
12 rebuttal, maybe slightly different, but that's what's  
13 anticipated.

14 THE COURT: All right. Gentlemen, do you  
15 want any kind of time warnings on the hour-and-a-half?

16 MR. HECTOR CANALES: I'll take ten minutes,  
17 Judge.

18 THE COURT: Ten-minute time warnings?

19 MR. GUERRA: Same, Your Honor.

20 MR. CYGANIEWICZ: Just notify me when I've  
21 completed an hour.

22 THE COURT: Very good.

23 MR. LOWELL: Your Honor, we are ready.

24 THE COURT: All right. Let's bring in the  
25 jury, please.

1 COURT OFFICER: All rise for the jury.

2 (JURY IN.)

3 THE COURT: Thank you, everyone. Please be  
4 seated.

5 Ladies and gentlemen of the jury, again,  
6 welcome back. Again, thank you everyone for your  
7 promptness and your hard work thus far.

8 As I said previously outside to you, we are  
9 now in the final stages of the trial. With respect to  
10 that, it is now my duty to read this document which is  
11 entitled final jury instructions. I will be reading it  
12 to you, please be patient, please listen carefully, this  
13 will be your guide, your instruction manual to assist  
14 you in your deliberations.

15 Once I complete the bulk of this document, I  
16 will allow all of the parties to present their closing  
17 arguments. Everyone will be allowed the exact amount of  
18 time. I've given each party an hour-and-a-half;  
19 however, because the Government has the burden of proof  
20 in this case, they're allowed to split it up in how --  
21 however they chose to do so, an hour and 30 minutes, but  
22 they get to split it up.

23 With that said, please listen carefully and  
24 I'll try and get through this as quickly as possible  
25 without Ms. Sheila's hands going crazy. All right.

1 Ladies and gentlemen, as I stated, this is  
2 entitled United States versus -- of America v. Rodney  
3 Mesquias, Henry McInnis, and Francisco Pena.

4 Criminal No. 1:18-CR-00008.

5 Final Jury Instructions.

6 Section 1. General Instructions.

7 Members of the Jury: I will first give you  
8 some general Instructions. Then, I will give you some  
9 specific rules of law on this case. Finally, I will  
10 explain the procedures you should follow in your  
11 deliberation.

12 You must disregard any impression I may have  
13 given you during trial that I favor either side --  
14 either side or that I have an opinion about the facts of  
15 this case. You are the sole judges of the facts of this  
16 case. Other than my Instructions to you on the  
17 applicable law, you should dis -- disregard anything I  
18 may have said or done during the trial when deciding  
19 your verdict.

20 The next section is entitled, Duty to Follow  
21 Instructions.

22 As jurors, you must only judge the facts.  
23 It is your sworn duty to follow my Instructions along  
24 with the rules of law explained in these Instructions.

25 You must not disregard or give special



1 attention to any one instruction, and you must not  
2 question the wisdom or correctness of any rule I may  
3 direct you to follow. You must not substitute or follow  
4 your own notion or opinion about what the law is or  
5 ought to be. You must base your verdict solely on the  
6 evidence, without prejudice or sympathy.

7 The next section is entitled, Burden of  
8 Proof and Evidentiary Standard.

9 In -- in a criminal trial, Defendants are  
10 always presumed innocent, meaning the Defendants started  
11 the trial with a clean state. Remember, the indictment  
12 I read to you at the beginning of trial is not evidence  
13 of guilt.

14 The law does not require the Defendants to  
15 prove their own innocence. Instead, the law requires  
16 the Government to prove each Defendant is guilty beyond  
17 a reasonable doubt. If the Government failed to reach  
18 this burden for any Defendant, you must find that  
19 Defendant not guilty. Although the Government's burden  
20 of proof is strict, the Government need not prove the  
21 Defendants' guilt beyond all possible doubt. The law  
22 only requires the Government's proof overcomes any  
23 reasonable doubt about each Defendant's guilt.

24 A reasonable doubt is a doubt based on  
25 reason and common sense after careful and impartial

1 consideration of all evidence presented. Thus, proof  
2 beyond a reasonable doubt is proof so persuading that  
3 you would be willing to rely and act on it without  
4 hesitation in making the most important decisions of  
5 your own affairs.

6 The next section is entitled, A Defendant's  
7 Right to Remain Silent.

8 As already mentioned, the Government has the  
9 burden of proof throughout the Court -- throughout the  
10 entire trial. The Defendants never have to prove their  
11 innocence. That said, none of the Defendants need to  
12 present any evidence or testify to support their  
13 innocence. Each Defendant has the right to remain  
14 silent. Thus, you may not hold any Defendant's decision  
15 not to testify or not to present evidence against him.

16 The next section is entitled, Evidence:  
17 What is Proper Evidence?

18 The evidence you are to consider consists of  
19 the testimony of the witnesses, the documents, and other  
20 exhibits admitted into evidence, and any fair inferences  
21 and reasonable conclusions you can draw from the facts  
22 and circumstances proven.

23 The next section is entitled, Evidence:  
24 Excluding What is Not Evidence.

25 Statements, objections, or arguments made by

1 the attorneys are not evidence. It is each attorney's  
2 job to -- to point out what is significant or helpful to  
3 their side of the case, and in doing so, call your  
4 attention to certain facts or inferences that could  
5 otherwise escape your notice. That said, what the  
6 attorneys said here during the trial is not binding on  
7 you.

8 Similarly, do not assume that I have any  
9 opinion about the issues of this case based on anything  
10 I said or did during trial. If I sustained objections  
11 to certain questions, you must disregard those questions  
12 and answers. Do not speculate about what the witness  
13 would have said if permitted to answer the question.  
14 Your verdict must be based only on the legally  
15 admissible evidence and testimony.

16 The next section is entitled, Evidence:  
17 Inferences, Direct and Circumstantial.

18 Now that we've discussed what is not  
19 evidence, let us -- let us discuss what is evidence.  
20 There are, generally, two types of evidence: direct  
21 evidence and circumstantial evidence. Direct evidence  
22 is testimony from a witness who saw, heard, or touched  
23 the subject of questioning. Circumstantial evidence is  
24 evidence that proves a fact from which you can logically  
25 conclude another fact exists. You should consider and

1 weigh all of the -- all of the evidence presented to  
2 you. So, do not be concerned with whether it is --  
3 whether evidence is direct or circumstantial evidence.  
4 The law does not distinguish between the weight you  
5 should give either direct or circumstantial evidence.  
6 But the law require that, after weighing all of the  
7 evidence -- both direct and circumstantial -- you must  
8 be convinced of the Defendant's guilt beyond a  
9 reasonable doubt to find that Defendant guilty.

10 To do this, you may draw any reasonable  
11 inferences you feel are justified from the evidence. In  
12 other words, you may make reasonable deductions and  
13 reach conclusions that common sense dictates from the  
14 facts established by the evidence.

15 Once again, the law does not require you to  
16 accept all of the evidence as true or accurate.  
17 Rather -- excuse me. Rather, it is your job to decide  
18 whether the Government proved the Defendants are guilty  
19 beyond a reasonable doubt.

20 The next section is entitled, Credibility of  
21 Witnesses. Excuse me.

22 An important aspect of determining whether  
23 the Government and its burden -- met its burden of proof  
24 is weighing the validity and character of each  
25 individual witness and the testimony offered. It is

1 your job to make judgments about the witnesses'  
2 testimony. You should decide whether you believe all or  
3 any part of what each witness said and decide the  
4 importance of that testimony. In making that decision,  
5 I suggest you ask yourself these questions: Did the  
6 witness come across to you as honest? Did the witness  
7 have any reason not to tell the truth? Did the witness  
8 have a personal interest in the outcome of the case?  
9 Did the witness have any relationship with either the  
10 Government or the Defendant? Did the witness see or  
11 hear any events about which the witness testified? Did  
12 the witness have the opportunity and ability to  
13 understand the questions and answer them directly?  
14 Did -- did one witness's testimony differ from the  
15 testimony of other witnesses? These are a few examples  
16 of the considerations that will help you determine the  
17 accuracy and reliability of each witness.

18 In other words, your job is to think about  
19 the testimony of each witness you heard and decide how  
20 much you believe each witness. In making up your mind  
21 and reaching a verdict, do not make any decisions simply  
22 because there were more witnesses on one side than on  
23 the other side on that point. You will always -- you  
24 will always bear in mind that the law never imposes upon  
25 a defendant in a criminal case the burden or duty of

1 calling any witnesses or pro -- or producing any  
2 evidence.

3 The next section is entitled, Impeachment by  
4 Prior Inconsistencies.

5 The testimony of a witness may be  
6 discredited by showing that the witness testified  
7 falsely, or by evidence that at some other time the  
8 witness said or did something, or failed to say or do  
9 something, which is inconsistent with the testimony the  
10 witness gave at this trial.

11 Earlier statements of a witness were --  
12 earlier -- excuse me. Earlier statements of witness  
13 were not admitted in evidence to prove that the contents  
14 of those statements are true. You may not consider the  
15 earlier statements to prove that the content of an  
16 earlier statement is true; you may only use -- you may  
17 only use earlier statements to determine whether you  
18 think the earlier statements are consistent or  
19 inconsistent with the trial testimony of the witness and  
20 therefore whether they affect the credibility of that  
21 witness.

22 If you believe that a witness has been  
23 discredited in this manner, it is your exclusive right  
24 to give the testimony of that witness whatever weight  
25 you think it deserves.

1           Next section is entitled, Impeachment by  
2 Evidence of Truthful -- of Truthful/Untruthful  
3 Character.

4           You have heard the testimony of various  
5 individuals. You also heard testimony from others about  
6 their opinion about whether other witnesses are truthful  
7 people. It is up to you to decide from what you heard  
8 here which witnesses told the truth in this trial. In  
9 deciding this, you should bear in mind the testimony  
10 about witness's reputation for truthfulness as well as  
11 all the other factors already mentioned.

12           The next section is entitled, Expert Opinion  
13 Testimony.

14           During the trial, you heard the testimony of  
15 Laurie McMillan, who expressed opinions on specialized  
16 knowledge. If scientific, technical, or other  
17 specialized knowledge might help the jury understand the  
18 evidence or in determining a fact at issue, a witness  
19 qualified by knowledge, skill, experience, training or  
20 education may testify and state an opinion about such  
21 matters.

22           Just because such a witness expressed an  
23 opinion does not mean you accept this opinion. You  
24 should judge this testimony like any other testimony.  
25 You may accept it or reject it and give it as much

1 weight as you think it deserves -- considering the  
2 witness's education and experience, the soundness of the  
3 reasons given for the opinion, and all other evidence in  
4 the case.

5 The next section is entitled, Cautionary  
6 Instruction -- Transcript of Tape-Recorded Conversation.

7 Government's Exhibits C-2, C-4, C-7, C-10,  
8 C-12 and C-14 have been identified as typewritten  
9 transcripts of the oral conversations. The  
10 transcript -- transcripts also purport to identify the  
11 speakers engaged in this conversation.

12 I admitted the transcripts for the limited  
13 and secondary purpose of aiding you in following the  
14 content of the conversation as you listen to the tape  
15 recording, and also to aid you in identifying the  
16 speaker.

17 You are specifically instructed that whether  
18 the transcripts correctly or incorrectly reflect the  
19 content of the conversations or the identity of the  
20 speakers is for you to determine based on your own  
21 evaluation of the testimony you have heard about the  
22 preparation of the transcripts and from your own  
23 examination of the transcripts in relation to your  
24 hearing of the tape recording itself as the primary  
25 evidence of its own contents. If you should determine



1 that the transcripts are, in any respect incorrect or  
2 unreliable, you should disregard them to that extent.  
3 What you heard on the tapes is evidence, not the  
4 transcripts.

5 The next section is entitled, Cautionary  
6 Instruction -- Transcript -- Transcript of Foreign  
7 Language -- Tape Recorded Conversation.

8 Among the exhibits admitted during the trial  
9 were recordings that contained conversations in the  
10 Spanish language. You were also provided English  
11 transcripts of those conversations. The Government  
12 provided those transcripts to you so that you can  
13 consider the content of the conversations on the  
14 recordings. Whether a transcript is an accurate  
15 translation, in whole or in part, is for you to decide.  
16 You should not rely in any way on any knowledge you may  
17 have of the -- of the language spoken on the recording;  
18 your consideration of the transcripts should be based on  
19 the evidence introduced in the trial.

20 In considering whether the transcripts  
21 accurately describe the meaning of a conversation, you  
22 should consider the testimony presented to you about  
23 how, and by whom, the transcript was made. You may  
24 consider the knowledge, training, and experience of the  
25 translator, as well as the nature of the conversation

1 and the reasonableness of the translation given all the  
2 evidence in the case.

3 We are now at Roman section -- excuse me.  
4 Section Roman Number Two entitled, Specific  
5 Instructions.

6 After considering the witness testimonies  
7 and exhibits, it is your duty to apply that evidence to  
8 the individual factors of the charged offense. You  
9 should use the following considerations to make this  
10 determination.

11 The next sections are entitled by various  
12 definitions. The first one is entitled, Sometime On or  
13 Around.

14 You will note that the indictment charges  
15 that the offenses were committed sometime on or around  
16 specific dates. The Government does not have to prove  
17 that the offense was committed on that exact date, so  
18 long as the Government proves beyond a reasonable doubt  
19 that the Defendants committed the crimes on or around  
20 the dates alleged in the indictment.

21 Next section is entitled, Venue-Conspiracy.

22 The events presented at trial happened in  
23 various places. There is no requirement that the entire  
24 conspiracy take place in the Southern District of Texas.  
25 But for you to return a guilty verdict, the Government

1 must prove by a preponderance of the evidence that  
2 either the agreement or an overt act took place in the  
3 Southern District of Texas. This means the Government  
4 has to convince you only that it is more likely than not  
5 that part of the conspiracy took place in the Southern  
6 District of Texas. All other elements of the offense  
7 must be proved beyond a reasonable doubt. You are  
8 instructed that Brownsville, Harlingen, McAllen, Corpus  
9 Christi, Laredo, Sugar Land, and Houston are all located  
10 in the Southern District of Texas.

11 Voluntary -- the next section is entitled,  
12 Voluntariness of Statements.

13 In determining whether any statement,  
14 claimed to have been made by any Defendant outside court  
15 and after an alleged crime has been committed, was  
16 knowingly and voluntarily made, you should consider the  
17 evidence on such a statement with caution and great  
18 care, and you should give such weight to the statement  
19 as you feel it deserves under all the circumstances.

20 In that regard, you may consider factors  
21 such as the age, training, education, occupation, and  
22 physical and mental condition of the Defendant in  
23 question, his treatment while under interrogation, and  
24 all the other circumstances in evidence surrounding  
25 making the statement.

1           The next section is entitled, Identification  
2     Testimony.

3           In any criminal case, the Government must  
4     prove not only the essential elements of the offense or  
5     offenses charged, but it must also prove, beyond a  
6     reasonable doubt, the identity of the Defendants as the  
7     perpetrators of the alleged offenses.

8           In evaluating the identification testimony  
9     of a witness, you should consider, as already mentioned,  
10    all the factors to determine the credibility of any  
11    witness in general. You should also consider whether  
12    the witness had an adequate opportunity to observe the  
13    person in question at the time or times about which the  
14    witness has testified. You may consider all matters,  
15    including how long the witness had to observe the person  
16    in question, the prevailing conditions at the time -- as  
17    for visibility, distance, and the like -- and whether  
18    the witness had known or observed the person in question  
19    at earlier times.

20           You may also consider the circumstances  
21    surrounding the identification itself including, for  
22    example, how the Defendants were presented to the  
23    witness for identification, and the length of time the  
24    last -- that elapsed between the incident in question  
25    and the next opportunity the witness had to observe the

1 Defendants.

2 If, after examining all the testimony and  
3 evidence in this case, you have a reasonable doubt about  
4 the identity of any of the Defendants as the  
5 perpetrators of the alleged offense -- of the offenses  
6 charged, you must find those Defendants not guilty.

7 The next section is entitled, Aiding and  
8 Abetting (Agency).

9 The Defendants' guilt may be established  
10 without proof that the Defendants personally did every  
11 act constituting the offense alleged. The law  
12 recognizes that, ordinarily, anything a person can do  
13 for himself may also be accomplish -- accomplished by  
14 him through the direction of another person as his or  
15 her agent, or by acting in concert with, or under the  
16 direction of, another person or persons in a joint  
17 effort or enterprise.

18 If another person is acting under the  
19 direction of a Defendant or the Defendant joins another  
20 person and performs acts with the intent to commit a  
21 crime, then the law holds the Defendant responsible for  
22 the acts and conduct of such other persons just as  
23 though the Defendant had committed the acts or engaged  
24 in such conduct.

25 Before the Defendants may be held criminally

1 responsible for the acts of others, it is necessary that  
2 the accused deliberately associate himself in some way  
3 with the -- the crime and participate in it -- in it  
4 with the intent to bring about the crime.

5           Mere presence at the scene of a crime and  
6 knowledge that a crime is being committed are not  
7 sufficient to establish that the Defendants either  
8 directed or aided and abetted the crime unless you find  
9 beyond a reasonable doubt that the Defendant was a  
10 participant and not merely a knowing spectator.

11           In other words, you may not find any  
12 Defendant guilty unless you find the Government proved  
13 beyond a reasonable doubt that some person or persons  
14 committed every element of the offense as defined in  
15 these Instructions, and the Defendant voluntarily  
16 participated in its commission with the intent to  
17 violate the law.

18           For you to find any Defendant guilty of this  
19 crime, you must be convinced that the Government proved  
20 each -- proved each of the following beyond a reasonable  
21 doubt:

22                   Number 1, That the offense was committed by  
23 some person;

24                   Number 2, That the Defendant associated with  
25 the criminal venture;

1                   Number 3, That the Defendant purposefully  
2 participated in the criminal venture; and

3                   Number 4, That the Defendant sought by  
4 action to make that venture successful.

5                   "Associated with the criminal venture" means  
6 that the Defendant shared the criminal intent of the  
7 principal. Element (2) cannot be established if the  
8 Defendant had no knowledge of the principal's criminal  
9 venture.

10                  "Participated in the criminal venture" means  
11 that the Defendant engaged in some affirmative conduct  
12 designed to aid the venture or assist the principal of  
13 the crime.

14                  The next section is entitled, Caution:  
15 Consider Only the Crime Charged.

16                  Remember, you are here to decide whether the  
17 Government has proved beyond a reasonable doubt that  
18 each Defendant is guilty of the crime charged. The  
19 Defendants are not on trial for any act, conduct, or  
20 offense not alleged in the indictment.

21                  Next section is entitled, Caution: Multiple  
22 Defendants and Single Count.

23                  You should consider the case of each  
24 Defendant and the evidence related to that Defendant  
25 separately and individually. The fact that you may find

1 one of the Defendants guilty or not guilty should not  
2 control your verdict for any other Defendant.

3 Next section is entitled, Caution: Multiple  
4 Defendants and Multiple Counts.

5 A separate crime is charged against one or  
6 more of the Defendants in each count of the indictment.  
7 Each count, and the evidence related to it, should be  
8 considered separately. The case of each -- the case of  
9 each Defendant should be considered separately and  
10 individually. The fact that you may find one or more of  
11 the accused guilty or not guilty of any of the crimes  
12 charged should not control your verdict for any other  
13 crime or any other Defendant. You must give separate  
14 consideration to the evidence as to each Defendant.

15 Next section is entitled, Caution:  
16 Punishment.

17 Finally, if you find any of the Defendants  
18 guilty, it will be my duty to decide what the punishment  
19 will be. You should not be concerned with punishment in  
20 arriving at your verdict.

21 Next section is entitled, Similar Acts.

22 You have heard evidence of acts of the  
23 Defendants which may be similar to those charged in the  
24 indictment, but which were committed on other occasions.  
25 You must not consider any of this evidence in deciding



1 whether the Defendant committed the acts charged in the  
2 indictment. But you may consider this evidence for  
3 other narrow purposes.

4 If you find beyond a reasonable doubt from  
5 other evidence in this case that the Defendant did  
6 commit the acts charged in the indictment, then you may  
7 consider evidence of the similar acts allegedly  
8 committed on other occasions to determine:

9 Whether the Defendant had the state of mind  
10 or intent necessary to commit the crime charged in the  
11 indictment; or

12 Whether the Defendant had a motive or the  
13 opportunity to commit the acts charged in the  
14 indictment; or

15 Whether the Defendant acted according to a  
16 plan or in preparation for commission of a crime; or

17 Whether the Defendant committed the acts for  
18 which he is on trial by accident or mistake. These are  
19 the limited purposes for -- for which any evidence of  
20 other similar acts may be considered.

21 The next section is entitled, Summaries and  
22 Charts Received in Evidence.

23 Certain charts and summaries have been  
24 received in evidence. You should give them only such  
25 weight as you think they deserve.

1                   Next section is entitled, Accomplice-  
2                   Co-Defendant-Plea Agreement.

3                   In this case, the Government called Jose  
4                   Garza and Jesus Virlar-Cadena as two of its witnesses.  
5                   Both Mr. Garza and Mr. Virlar were named as  
6                   co-Defendants in the indictment and entered into plea  
7                   agreements with the Government. These agreements  
8                   provide for the dismissal of some charges and a  
9                   non-binding recommendation for a favorable sentence.  
10                  This is called plea bargaining, and it is lawful and  
11                  proper.

12                  An accomplice who has entered into a plea  
13                  agreement with the Government is not prohibited from  
14                  testifying. On the contrary, the testimony of such a  
15                  witness may alone be of sufficient weight to sustain a  
16                  guilty verdict. You should receive this testimony with  
17                  great care. You should never convict a Defendant upon  
18                  the unsupported testimony of an alleged accomplice  
19                  unless you believe that testimony beyond a reasonable  
20                  doubt.

21                  The fact that an accomplice has entered a  
22                  guilty plea to the offense charged is not evidence of  
23                  the guilt of any other person.

24                  The next section is entitled, Accomplice-  
25                  Informer-Immunity.

1           The testimony of an alleged accomplice,  
2     and/or the testimony of one who provides evidence  
3     against a Defendant as an informer for pay, for immunity  
4     for punishment, or for personal advantage or  
5     vindication, must always be examined and weighed by the  
6     jury with great -- with greater care and caution than  
7     the testimony of ordinary witnesses. You, the jury,  
8     must decide whether the witness's testimony has been  
9     affected by these circumstances, by the witness's  
10    interest in the outcome of the case, by prejudice  
11    against the Defendant, or by the benefits that the  
12    witness has received either financially or as a result  
13    of being immunized from prosecution. You should keep in  
14    mind that this testimony is always to be received with  
15    caution and weighed with great care.

16           You should not convict any Defendant upon  
17    the unsupported testimony of such a witness unless you  
18    believe that testimony beyond a reasonable doubt.

19           Next section is entitled, Impeachment by  
20    Prior Conviction (Witness Other Than Defendant).

21           You have been told that the witness Eduardo  
22    Carrillo was convicted in 2015 of health care fraud and  
23    aggravated identity theft. A conviction is a factor you  
24    may consider in deciding whether to believe that  
25    witness, but it does not necessarily destroy the

1 witness's credibility. It has been brought to your  
2 attention only because you may wish to consider it when  
3 you decide whether you believe the witness's testimony.  
4 It not evidence of anything else.

5 Next section is entitled, Witnesses' Use of  
6 Addictive Drugs.

7 The testimony of a witness who is shown to  
8 have used addictive drugs during the time about which  
9 the witness testified must always be examined and  
10 weighed by the jury with greater care and caution than  
11 the testimony of ordinary witnesses. You should  
12 not consider any Defendant to -- not consider any  
13 Defendant -- excuse me. Excuse me. Let me rephrase  
14 that. You should not convict any Defendant upon the  
15 unsupported testimony of such a witness unless you  
16 believe that the -- that testimony beyond a reasonable  
17 doubt.

18 Next section is entitled, Multiple  
19 Conspiracies.

20 You must determine whether the conspiracy  
21 charged in the indictment -- indictment existed, and, if  
22 it did, whether the Defendant was a member of it. If  
23 you find that the conspiracy charged did not exist, then  
24 you must return a not guilty verdict for that  
25 conspiracy, even though you find that some other

1 conspiracy existed. If you find that a Defendant was  
2 not a member of the conspiracy charged in the  
3 indictment, then you must find that Defendant not  
4 guilty, even though that Defendant may have been a  
5 member of some other conspiracy.

6 Next section is entitled, Evidence on  
7 Medicare Claims.

8 The Government is not required to prove that  
9 each and every claim submitted by the Merida Group  
10 entities to Medicare was fraudulent. Nor is it a  
11 defense to the crimes of Conspiracy to Commit Health  
12 Care Fraud (Count One) or health care fraud (Counts Two  
13 through Seven), that Defendants submitted some number of  
14 legitimate -- legitimate claims. However, in -- in  
15 order for you to find the Defendants guilty of  
16 Conspiracy to Commit Health Care Fraud (Count One) or  
17 health care fraud (Counts Two through Seven), you must  
18 find that the Government proved the elements of these  
19 offenses beyond a reasonable doubt.

20 The next section is entitled, Medicare  
21 Regulations.

22 The violation of a civil Medicare  
23 regulation, if such violation occurred, is not alone a  
24 criminal offense. I hereby instruct you that the  
25 evidence of alleged violations does not necessarily mean

1     that a crime has been committed, but that -- that same  
2     evidence may or may not be relevant in determining the  
3     Defendants state of mind -- mind and whether the  
4     Defendants acted with criminal intent.

5                 Next section is entitled, Safe Harbor Theory  
6     of Defense.

7                 In Count 12 the Government has alleged a  
8     conspiracy to violate the Anti-Kickback Statute by  
9     paying fees in exchange for the referral of Medicare  
10    beneficiaries.

11                Congress has authorized certain limited  
12    exceptions to the Anti-Kickback Statute prohibitions,  
13    which exceptions sometimes are called "safe harbors"  
14    found in both 42 U.S.C. Section 1320a-7b(b)(3)(B)(i) and  
15    42 C.F.R. Section 1001.952. One such safe harbor  
16    exception includes payments made under a "personal  
17    services and management contracts".

18                The Defendants contend that the payments  
19    reflected in certain checks that are the subject of the  
20    charges in Counts 12 are protected under a "personal  
21    services and management contracts", safe -- safe harbor  
22    found at 42 C.F.R. Section 1001.952(d)(1)-(7).

23                You must decide whether these checks paid to  
24    Defendants are or are not within the requirements of the  
25    "personal services and management contracts", safe

1 harbor. If you find that the -- the checks in issue  
2 were paid for reasons protected from prosecution, you  
3 must find these Defendants "not guilty" of the violation  
4 of the Anti-Kickback Statute charged in Count 12.

5 To assert the "personal services and  
6 management contracts" safe harbor as an affirmative  
7 defense, the Defendant must prove each of the following  
8 elements by a preponderance of the evidence. To prove a  
9 fact by a preponderance of the evidence means to prove  
10 that the fact is more likely so than not so. This is a  
11 lesser burden than the -- lesser burden than to prove a  
12 fact beyond a reasonable doubt.

13 The elements which the Defendant must prove  
14 by a preponderance of the evidence to establish safe  
15 harbor are as follows:

16 Number (1), The agency agreement is set out  
17 in writing and signed by the parties;

18 Number (2), The agency agreement covers all  
19 of the services the agent provides to the principal for  
20 the term of the agreement and specifies the services to  
21 be provided by the agent;

22 Number (3), If the agency agreement is  
23 included to provide for the services of the agent on  
24 a -- on a periodic, sporadic or part-time basis, rather  
25 than on a full-time basis for the term of the agreement,

1 the agreement specifies exactly the schedule of such  
2 intervals, their precise length, and the exact charge  
3 for such intervals;

4           Number (4), The term of agreement is for not  
5 less than one year;

6           Number (5), The aggregate compensation paid  
7 to the agent over the term of the agreement is set in  
8 advance, is consistent with fair market value in  
9 arms-length transactions and is not determined in a  
10 manner that takes into account the volume or value of  
11 any referrals or business otherwise generated between  
12 the parties for which payment may be made in whole or in  
13 part under Medicare, Medicaid or other federal health  
14 care programs;

15           Number (6), The services performed under the  
16 agreement do not involve the counseling or promotion of  
17 a business arrangement or other activity that violates  
18 any State or Federal law;

19           Number (7), The aggregate services  
20 contracted for -- contracted for do not exceed those  
21 which are -- are reasonable.

22           The next section is entitled, Relevant Terms  
23 Defined.

24           Number 1. The word "knowingly" means that  
25 the act was done voluntarily and intentionally, not



1 because of mistake or accident.

2           Number 2. The word "willfully" means that  
3 the act was committed voluntarily and purposefully, with  
4 the specific intent to do something the law forbids;  
5 that is to say, with bad purpose either to disobey or  
6 disregard the law.

7           Number 3. The words "scheme or artifice"  
8 means any plan, pattern, or course of action involving a  
9 false or fraudulent pretense, representation, or promise  
10 intended to deceive others in order to obtain something  
11 of value, such as money, from the institution to be  
12 deceived.

13           Number 4. The phrase "intent to defraud"  
14 means that a Defendant acted knowingly and with the  
15 specific intent to deceive, ordinarily for the purpose  
16 of causing some financial loss to another or bringing  
17 about some financial gain to the Defendant. The  
18 Government does not have to prove that the Defendant had  
19 actual knowledge of or specific intent to violate the  
20 applicable health care fraud statutes.

21           Number 5. A representation is "false" if it  
22 is known to be untrue or is made with reckless  
23 indifference as to its truth or falsity. A  
24 representation is also "false" when it constitutes a  
25 half truth, or effectively omits or conceals a material

1 fact, provided it is made with intent to defraud.

2 Excuse me.

3 Number 6. Similarly, a representation is  
4 "material" if it has a natural tendency to influence, or  
5 is capable of influencing, the institution to which it  
6 is addressed.

7 Number 7. Finally, health care "benefits"  
8 mean the -- the "health care items or services covered  
9 under a health insurance plan" or as defined "in state  
10 program rules."

11 Number 8. A "health care benefit program"  
12 is defined as "any public or private plan or contract  
13 affecting commerce, under which any medical benefit,  
14 item, or service is provided to any individual, and  
15 includes any individual or entity who is providing a  
16 medical benefit, item, or service, for which payment may  
17 be made under the plan or contract."

18 Number 9. "Interstate commerce" means  
19 commerce or travel between one state, territory, or  
20 possession of the United States, including the District  
21 of Columbia. "Commerce" includes travel, trade,  
22 transportation, and communication. Only a minimal  
23 effect is required to show that the health care benefit  
24 program "affected interstate commerce."

25 Number 10. A "conspiracy" is an agreement

1 between two or more persons to join together to  
2 accomplish some unlawful purpose. It is a kind of  
3 "partnership in crime" in which each member becomes the  
4 agent of every other member. One may become a member of  
5 a conspiracy without knowing all the details of the  
6 unlawful scheme or the identities of all the other  
7 alleged conspirators. If a Defendant understands the  
8 unlawful nature of a plan or scheme and knowingly and  
9 intentionally joins in that plan or scheme on one  
10 occasion, that is sufficient to convict him for  
11 conspiracy even though the Defendant had not  
12 participated before and even though the Defendant played  
13 only a minor part.

14           The Government need not prove that the  
15 alleged conspirators entered into any formal agreement,  
16 nor that they directed stated between themselves all the  
17 details of the scheme. Similarly, the Government need  
18 not prove that all the of the details of the scheme  
19 alleged in the indictment were actually agreed upon or  
20 carry out. Nor must it prove that all of the persons  
21 alleged to have been members of the conspiracy were  
22 such, or that the alleged conspirators actually  
23 succeeded in accomplishing their unlawful objectives.

24           Mere presence at the scene of an event, even  
25 with knowledge that a crime is being committed, or the

1 mere fact that certain persons may have associated with  
2 each other, and may have assembled together and  
3 discussed common aims and interests, does not  
4 necessarily establish proof of the existence of a  
5 conspiracy. Also, a person who has no knowledge of a  
6 conspiracy, but who happens to act in a way which  
7 advances some purpose of a conspiracy, does not thereby  
8 become a conspirator.

9           Number 11. An "overt act" is an act  
10 performed to effect the object of a conspiracy, although  
11 it remains separate and distinct from the conspiracy  
12 itself. Though the overt act need not be of a criminal  
13 nature, it must be done in furtherance of the object of  
14 the conspiracy.

15           The next section Roman Numeral Number 3 is  
16 entitled, Instructions on the Counts Listed in the  
17 Indictment.

18           Count One: The next -- the next section is  
19 entitled, Count One: Instructions for Conspiracy to  
20 Commit Health Care Fraud.

21           Title 18, United States Code, Section 1349  
22 makes it a crime for anyone to knowingly and willfully  
23 combine, conspire, confederate and agree with each other  
24 and others, known and unknown to the Grand Jury, to  
25 execute a scheme and artifice to defraud Medicare, or to

1 obtain by means of materially false and fraudulent  
2 pretenses, representations and promises, money and  
3 property owned by, and under the custody and control of  
4 Medicare, in connection with the delivery of and payment  
5 for health care benefits.

6 For you to find Rodney Mesquias, Henry  
7 McInnis and/or Francisco Pena guilty of the crime  
8 charged, the Government must convince you that it proved  
9 each of the following beyond a reasonable doubt:

10 Number 1. The Defendant and at least one  
11 other person made an agreement to commit the crime of  
12 health care fraud, as charged in the indictment;

13 Number 2. The Defendant knew the unlawful  
14 purpose of this agreement;

15 And number 3. The Defendant joined in the  
16 agreement willfully.

17 The next section is entitled, Counts Two  
18 through Seven, entitled, Health Care Fraud.

19 Title 18, United States Code, Section  
20 1347(a) makes it a crime for anyone to knowingly and  
21 willfully execute, or attempt to execute, a scheme and  
22 artifice to defraud Medicare, or to obtain any of the  
23 money -- money of property owned by or under the custody  
24 or control of Medicare by means of false or fraudulent  
25 pretenses, representations, or promises.

1           The next section is literally a table chart.  
2       I will attempt to summarize the chart by reading it into  
3       the record as follows:

4           Count Two, Defendant Rodney Mesquias and  
5       Henry McInnis, certification periods August 14, 2013 to  
6       October 12th, 2013, Entity, Professional Hospice Care,  
7       Description of Services, hospice services, patient J.H.,  
8       Medicare payment, \$2,567.52.

9           The next line on the table is Count Three,  
10      includes Rodney Mesquias, Henry McInnis and Francisco  
11      Pena. Certification period December 18, 2013 to March  
12      17, 2014, entity, Professional Hospice Care, description  
13      of services, hospice services, patient F.P., Medicare  
14      payment \$4,089.52.

15          The next line of the table is Count Four,  
16      includes Rodney Mesquias and Henry McInnis. Well, just  
17      the name Henry at least on -- on this form.  
18      Certification period, November 6th, 2013 to February 3,  
19      2014, entity, Professional Hospice Care, description of  
20      services, hospice services, patient T.C., Medicare  
21      payment \$4,304.75.

22          Next line is line five, Defendants Rodney  
23      Mesquias and Henry McInnis, certification period, June  
24      3, 2014 to August 31, 2014, entity, Bee Caring,  
25      description of services, hospice services, patient A.C.,

1 Medicare payment \$4,448.19.

2           Next line of the table is Count Six,  
3 includes Defendants Rodney Mesquias, Henry McInnis.  
4 Certification period, February 10, 2016 to April 9,  
5 2016, entity, Bee Caring, description of services,  
6 hospice services, patient P.C., Medicare payment  
7 \$3,202.85.

8           Next line is Count Seven, Rodney Mesquias  
9 and Henry McInnis. Excuse me. Certification period  
10 December 23, 2014 to March 22, 2015, entity, Bee Caring  
11 hospice, description of services, hospice services,  
12 patient J.C. and Medicare payment \$1,282.61.

13           I know -- I now go back to the general text  
14 of the charge.

15           Count Two charges Defendants Rodney Mesquias  
16 and Henry McInnis with health care fraud in connection  
17 with Medicare beneficiary Jack High.

18           Count Three charges Defendants Rodney  
19 Mesquias, Henry McInnis, and Francisco Pena with health  
20 care fraud in connection with Medicare beneficiary  
21 Francisca Perez.

22           Count Four charges Defendants Rodney  
23 Mesquias and Henry McInnis with health care fraud in  
24 connection with Medicare beneficiary Teresa Calvillo.

25           Count Five charges Defendants Rodney

1 Mesquias and Henry McInnis with health care fraud in  
2 connection with Medicare beneficiary Arcadio Castaneda.

3 Count Six charges Defendant Rodney Mesquias  
4 and Henry McInnis with health care fraud in connection  
5 with Medicare beneficiary Petra Cerda.

6 Count Seven charges Defendants Rodney  
7 Mesquias and Henry McInnis with health care fraud in  
8 connection with Medicare beneficiary Joanne Conti.

9 For you to find Rodney Mesquias, Henry  
10 McInnis and/or Francisco Pena guilty of this crime, you  
11 must be convinced the Government proved each of the  
12 following beyond a reasonable doubt:

13 Number 1. The Defendant knowingly and  
14 willfully executed a scheme or artifice to  
15 defraud Medicare by means false or fraudulent pretenses,  
16 representations, or promises in connection with the  
17 delivery of or payment for health care benefits, items  
18 or services;

19 Number 2. The Defendant acted with specific  
20 intent to defraud Medicare.

21 Number 3. The false or fraudulent  
22 representations the Defendant used were material; and

23 Number 4. The operation of the health care  
24 benefit program affected interstate commerce.

25 The Government does not have to prove that



1 the Defendant had actual knowledge of -- of or specific  
2 intent to violate the applicable health care fraud  
3 statutes.

4 It is not necessary that the Government  
5 prove all the details alleged in the indictment  
6 concerning the precise nature of the alleged scheme, or  
7 that the alleged scheme actually succeeded in defrauding  
8 someone. What must be proven beyond a reasonable doubt  
9 is that the accused knowingly executed or attempted to  
10 execute a scheme that was substantially similar to the  
11 scheme alleged in the indictment.

12 Next section is entitled, Conspirator's  
13 Liability for Substantive Counts.

14 A conspirator is responsible for offenses  
15 committed by another conspirator if the conspirator was  
16 a member of the conspiracy when the offense was  
17 committed and if the offense was committed in  
18 furtherance -- furtherance or, as a foreseeable  
19 consequence of, the conspiracy. Thus, if you have first  
20 found the Defendant guilty of the conspiracy charged in  
21 Count One and if you find beyond a reasonable doubt that  
22 during the time the Defendant was a member of that  
23 conspiracy, other conspirators committed the offenses in  
24 Counts Two through Seven in furtherance of and as a  
25 foreseeable consequence of that conspiracy, then you may

1 find the Defendant guilty of counts Two through Seven,  
2 even though the Defendant may not have participated in  
3 any of the acts which constitute the offenses described  
4 in counts Two through Seven.

5 Next section is entitled, Count Eight,  
6 Conspiracy to Commit Money Laundering.

7 Title 18, United States Code, Section  
8 1956(h), makes it a crime for anyone to conspire with  
9 someone else to commit an offense against the laws of  
10 the United States.

11 Rodney Mesquias, Henry McInnis and/or  
12 Francisco Pena are charged with conspiring to commit  
13 money laundering.

14 A "conspiracy" is an agreement between two  
15 or more persons to join together to accomplish some  
16 unlawful purpose. It is the kind of "partnership in  
17 crime" in which each member becomes the agent of every  
18 other member.

19 For you to find the Defendants guilty of  
20 this crime, you must be convinced that the Government  
21 has proved each of the following beyond a reasonable  
22 doubt:

23 First: That the Defendants and at least one  
24 other person made an agreement to commit the crime of  
25 conspiracy to commit health care fraud and health care

1 fraud, as charged in the indictment;

2 Second: That the Defendants knew the  
3 unlawful purpose of the agreement and joined in it  
4 willfully, that is, with the intent to further the  
5 unlawful purpose; and

6 Third: That one of the conspirators during  
7 the existence of the conspiracy knowingly committed at  
8 least one of the overt acts described in the indictment,  
9 in order to accomplish some object or purpose of the  
10 conspiracy.

11 One may become a member of a conspiracy  
12 without knowing all the details of the unlawful scheme  
13 or the identities of all the other alleged conspirators.  
14 If a Defendant understands the unlawful nature of a plan  
15 or scheme and knowingly and intentionally joins in that  
16 plan or scheme on one occasion, that is sufficient to  
17 convict him for conspiracy even though the Defendants  
18 had not participated before and even though the  
19 Defendants played only a minor part.

20 The Government need not prove that the  
21 alleged conspirators entered into any formal agreement,  
22 nor that they directly stated between themselves all the  
23 details of the scheme. Similarly, the Government need  
24 not prove that all of the details of the scheme alleged  
25 in the indictment were actually agreed upon or carried

1 out. Nor must it prove that all the persons alleged to  
2 have been members of the conspiracy were such, or that  
3 the alleged conspirators actually succeeded in  
4 accomplishing their unlawful objectives.

5 Mere presence at the scene of an event, even  
6 with knowledge that a crime is being committed, or the  
7 mere fact that certain persons may have associated with  
8 each other, and may have assembled together and  
9 discussed common aims and interests, does not  
10 necessarily establish proof of the existence of a  
11 conspiracy. Also, a person who has no knowledge of a  
12 conspiracy, but who happens to act in a way which  
13 advances some purpose of a conspiracy, does not thereby  
14 become a conspirator.

15 Next section is entitled, Multiple Objects  
16 of Conspiracy.

17 Count Eight of the indictment charges the  
18 Defendants with conspiracy to commit three separate  
19 substantive money laundering crimes:

20 Subsection a. to knowingly conduct and  
21 attempt to conduct financial transactions affecting  
22 interstate and foreign commerce, which involved the  
23 proceeds of specified unlawful activity, that is, health  
24 care fraud and Conspiracy to Commit Health Care Fraud,  
25 with the intent to promote the carrying on of specified

1 unlawful activity, that is health care fraud and  
2 Conspiracy to Commit Health Care Fraud, and that while  
3 conducting and attempting to conduct such financial  
4 transactions knew that the property involved in the  
5 financial transaction represented the proceeds of some  
6 form of unlawful activity in violation of Title 18,  
7 United States Code, Section 1956(a)(1)(A)(i);

8           Subsection b. to knowingly conduct and  
9 attempt to conduct financial transactions affecting  
10 interstate and foreign commerce, which involved proceeds  
11 of specified unlawful activity, that is, health care  
12 fraud and Conspiracy to Commit Health Care Fraud,  
13 knowing that the transactions were designed in whole or  
14 in part to conceal and disguise the nature, location,  
15 source, ownership, and control of the proceeds of the  
16 specified unlawful activity, and that while conducting  
17 and attempting to conduct such financial transactions,  
18 knew that the property involved in the financial  
19 transactions represented the proceeds of some form of  
20 unlawful activity, in violation of Title 18, United  
21 States Code, Section 1956(a)(1)(B)(i); and

22           Subsection c. to knowingly engage and  
23 attempt to engage, in monetary transactions by -- by,  
24 through or to a financial institution, affecting  
25 interstate and foreign commerce, in criminally derived

1 property of a value greater than \$10,000, such property  
2 having been derived from a specified unlawful activity,  
3 that is, health care fraud and Conspiracy to Commit  
4 Health Care Fraud, in violation of Title 18, United  
5 States Code, Section 1957.

6 The Government does not have to prove that  
7 Defendants willfully conspired to commit each crime as  
8 charged in the indictment. It is sufficient if the  
9 Government proves beyond a reasonable doubt that  
10 Defendants willfully conspired to commit at least one of  
11 those crimes. But to return a verdict of guilty, you  
12 must all agree on at least one of the crimes the  
13 Defendants conspired to commit as charged in Count One  
14 through Seven.

15 Count -- next section is entitled, Count  
16 Nine, Obstruction of Criminal Investigation of Health  
17 Care Offenses.

18 Title 18, United States Code, Section 1518  
19 makes it a crime for anyone to willfully prevent,  
20 obstruct, mislead, and delay or attempt to willfully  
21 prevent, obstruct, misled or delay the communication of  
22 information and records relating to Health Care Fraud to  
23 agents of the Federal Bureau of Investigation. For you  
24 to find Francisco Pena guilty of this crime, you must be  
25 convinced the Defendant -- excuse me, you must be

1 convinced the Government proved each of the following  
2 beyond a reasonable doubt:

3           Number 1. The Defendant prevented,  
4 obstructed, misled, delayed, or attempted to prevent,  
5 obstruct, mislead or delay, the communication of  
6 information or records relating to a violation of a  
7 federal health care offense to a criminal investigator;  
8 and

9           Number 2. The Defendant did so willfully.

10           "Criminal investigation" means any  
11 individual -- excuse me, criminal investigator --  
12 "criminal investigator" means any individual duly  
13 authorized by a department, agency, or armed force of  
14 the United States to conduct or engage in investigations  
15 for prosecutions for violations of health care offenses.

16           "Federal health care offense" means a  
17 violation of, or a criminal Conspiracy to Commit Health  
18 Care Fraud and payment or receipt of illegal kickbacks.

19           Next section is entitled, Count Ten, False  
20 Statement.

21           Title 18, United States Code, Section 1001  
22 makes it a crime for anyone to knowingly and willfully  
23 make a false, fictitious, or fraudulent statement in a  
24 matter within the jurisdiction of the Federal Bureau of  
25 Investigation. For you to find Francisco Pena guilty of

1 this crime, you must be convinced that the Government  
2 has proved each of the following beyond a reasonable  
3 doubt:

4           Number 1. The Defendant made a false  
5 statement to the Federal Bureau of Investigation, an  
6 agency within the executive branch of the United States,  
7 regarding a matter within its jurisdiction;

8           Number 2. The Defendant made the statement  
9 intentionally, knowing it was false;

10           Number 3. The statement was material; and

11           Number 4. The Defendant made the false  
12 statement to mislead the Federal Bureau of  
13 Investigation.

14           It is not necessary to show that the Federal  
15 Bureau of Investigation was in fact misled.

16           Count 11, Conspiracy to Obstruct Justice.

17           Title 18, United States Code, Section  
18 1512(k) makes it a crime for anyone to knowingly and  
19 willfully combine, conspire, confederate and agree with  
20 others to obstruct, influence, and impede a federal  
21 Grand Jury investigation, by causing false and  
22 fictitious records to be provided to federal  
23 investigators in response to a federal Grand Jury  
24 subpoena. For you to find Rodney Mesquias and/or Henry  
25 McInnis guilty of this crime, you must be convinced the



1 Government proved each of the following beyond a  
2 reasonable doubt:

3 Number 1. The Defendant and at least one  
4 other person made an agreement to commit the crime of  
5 obstructing justice as charged in the indictment;

6 Number 2. The Defendant knew the unlawful  
7 purpose of this agreement and joined in it willfully,  
8 that is, with the intent to further the unlawful  
9 purpose.

10 Count 12, Conspiracy to Pay and Receive  
11 Health Care Kickbacks.

12 Title 18, United States Code, Section 371  
13 makes it a crime to conspire to pay and receive  
14 kickbacks.

15 For you to find Rodney Mesquias and/or  
16 Francisco Pena guilty of this crime, you must be  
17 convinced the Government proved each of the following  
18 beyond a reasonable doubt:

19 Number 1. The Defendant and at least one  
20 other person made an agreement to commit the crime of  
21 paying or receiving kickbacks, as charged in the  
22 indictment;

23 Number 2. The Defendant knew the unlawful  
24 purpose of this agreement and joined in it willfully,  
25 that is, with the intent to further the unlawful

1 purpose; and

2           Number 3. One of the conspirators during  
3 the existence of the conspiracy knowingly committed at  
4 least one of the overt acts described in the indictment  
5 to accomplish -- to accomplish some object or purpose of  
6 the conspiracy.

7           Next section is entitled, Unanimity of  
8 Theory.

9           Count 12 of the indictment accuses Rodney  
10 Mesquias and Francisco Pena of conspiring to pay and  
11 receive kickbacks two ways: Number (1) -- let me see.  
12 That should state in two ways: Number (1), that Rodney  
13 Mesquias and Francisco Pena conspired to receive  
14 kickbacks; and number (2) that Rodney Mesquias and  
15 Francisco Pena conspired to pay kickbacks.

16           The Government does not have to prove both  
17 of these theories beyond a reasonable doubt for you to  
18 return a guilty verdict on this charge, proof beyond a  
19 reasonable doubt for one theory is enough. But to  
20 return a guilty verdict -- but to return a guilty  
21 verdict, all of you must agree the Government proved the  
22 same theory beyond a reasonable doubt. This means you  
23 all must agree the Government proved beyond a reasonable  
24 doubt that Rodney Mesquias and Francisco Pena conspired  
25 to receive kickbacks; or you must all agree the

1 Government proved beyond a reasonable doubt that Rodney  
2 Mesquias and Francisco Pena conspired to pay kickbacks.

3 Ladies and gentlemen, the next section is  
4 entitled, Closing Arguments.

5 The Government will now -- Government will  
6 now make its closing argument, followed by each  
7 Defendant's closing argument. Since the Government  
8 carries the burden here, I will allow the Government to  
9 make additional closing arguments after all the  
10 Defendants have made their closing arguments. As a  
11 reminder, closing arguments are not evidence. After  
12 both sides have made their closing arguments, the Court  
13 will give you additional Instructions about  
14 deliberations, selecting a foreperson, and submitting  
15 questions to the Court.

16 Counsel, before I commence with closing  
17 arguments, during the course of my reading of these  
18 first 20 pages, the Court's noted very minor typos that  
19 the Court is going to amend, or -- or revise while  
20 closing arguments are taking place.

21 Specifically, I will call your attention to,  
22 and I'm just going to go through this very quickly.

23 On page 7, the word crime is missing an e,  
24 the Court is going to add the e to the word crime in  
25 the -- in one of the paragraphs.

1           On page 11, state of mind is misspelled.  
2   The Court -- it is spelled as -- with an e rather than a  
3   d, the Court will revise it to state of mind as opposed  
4   to state of mine.

5           On page 12, the last sentence, the number  
6   seven, instead of a -- of a period, there's a -- a semi  
7   colon -- excuse me, excuse me, the word reasonable is  
8   misspelled as reasonably, the Court will revise that to  
9   read reasonable rather than reasonably. Period.

10          On page 15, count -- the table count number  
11   four, the -- Mr. McInnis' last name is blacked out,  
12   Count Four should read Rodney Mesquias, Henry, including  
13   Henry McInnis, it currently just reads Rodney Mesquias,  
14   Henry.

15          And on page 20, the number two in Count 11,  
16   there should be a period after the term unlawful purpose  
17   as opposed to semicolon and with an and. There is no --  
18   there's nothing to follow number two, so it's just  
19   unlawful purpose period.

20          And on page 21, the Court inserted the word  
21   in, i-n, in the very first sentence where it says, Count  
22   12 of the indictment accuses Rodney Mesquias and  
23   Francisco Pena of conspiring to pay and receive  
24   kickbacks in two ways. Currently it just reads received  
25   kickbacks two ways.

1                   Again, these are not substantive changes  
2                   just minor -- minor corrections.

3                   Any objections, gentlemen?

4                   MR. LOWELL: No objection.

5                   MR. CYGANIEWICZ: Judge, I failed to mention  
6                   earlier and I noticed when I received this copy last  
7                   night that the -- starting with the verdict forms, the  
8                   pages are not numbered correctly in case you're making  
9                   reference to page numbers later.

10                  My copy has page 22, then goes to page 19.

11                  THE COURT: All right. Thank you,  
12                  Mr. Cyganiewicz.

13                  Yes, and I am noting that -- I've not gotten  
14                  that far, but after page 22, it then jumps to 19, so  
15                  let's correct the page numbers.

16                  So 19 will be -- all of the pages after page  
17                  22 will be revised to read accordingly in numerical  
18                  order starting with 23 thereon.

19                  MR. CYGANIEWICZ: Yes, sir.

20                  THE COURT: Any objections, gentleman to  
21                  those minor --

22                  MR. LOWELL: No objection.

23                  MR. GUERRA: No objections, Your Honor.

24                  THE COURT: Thank you, gentlemen. All  
25                  right. Mauricio, do your magic. All right.

1           Ladies and gentlemen, before we get to the  
2 closing arguments, let's go ahead and take a very brief  
3 recess and we'll start momentarily. All right.

4           COURT OFFICER: All rise for the jury.

5           (JURY OUT.)

6           THE COURT: Thank you, everyone. Please be  
7 seated.

8           Ladies and gentlemen, we'll take a very  
9 brief recess and, Rachel, just get that revised document  
10 to counsel.

11          COURT OFFICER: All rise.

12          (COURT IN SHORT RECESS.)

13          THE COURT: Thank you, everyone. Please be  
14 seated.

15          (JURY IN.)

16          THE COURT: Ladies and gentlemen, welcome  
17 back. Out of an abundance of caution, I remind you  
18 we're now proceeding with closing arguments.

19               We have some very talented and very  
20 passionate attorneys that are advocates for their  
21 respective positions and clients. But I remind you that  
22 nothing the attorneys say is either evidence or  
23 testimony, it is their sum -- it is their summary and  
24 their advocacy of the position they intend to present  
25 that they believe the evidence showed.

1                   With that being said, Mr. Foster, are you  
2 ready to proceed?

3                   MR. FOSTER: Thank you, Your Honor.

4                   May it please the Court.

5                   Ladies and gentlemen of the jury, it was  
6 about power; it was about control over people's lives.  
7 That's what Joe Aguilar told you, and that's what this  
8 \$150,000,000 health care fraud scheme is about. Bribe  
9 after bribe after bribe paid by Defendants Mesquias and  
10 McInnis to doctors like Defendant Pena to commit fraud  
11 on the Medicare program designed to benefit the  
12 vulnerable and the disabled among us.

13                  Ladies and gentlemen, in the past two weeks,  
14 you have seen what these Defendants never wanted you to  
15 see. Witness after witness after witness has told you  
16 about a massive health care fraud conspiracy that  
17 stretched from Defendant McInnis' corporate headquarters  
18 near here in Harlingen throughout the Valley and across  
19 Texas.

20                  And you have heard from the Defendants'  
21 partners in crime, the people they did their dirty work  
22 with, Virlar, Carrillo, Garza, the men they worked with,  
23 not for a day, not for a week, not for a month, but for  
24 years to commit these crimes.

25                  And what those three co-conspirators told

1 you is consistent with what you heard from marketers,  
2 intake coordinators, nurses, doctors, FBI sources, FBI  
3 agents, all of whom spoke with one voice, the Merida  
4 Group was a massive fraud.

5           What you learned was that there were  
6 patients, patients who were walking, talking, gardening,  
7 driving, teaching boxing, working at -- as greeters at  
8 Wal-Mart, just out there living. But on paper, on  
9 paper, these Defendants made it look like those same  
10 patients declining, dying. Patients who were supposed  
11 to be homebound regularly leaving the home. Patients  
12 who were supposed to have less than six months to live  
13 on hospice for year after year.

14           Ladies and gentlemen, Joanne Conti told you  
15 what you need to know about the Merida Group. She came  
16 into this courtroom, she was right up there, and she  
17 told you about her experiences. She was active, she  
18 went to her grandchildren's football games, went to  
19 Corpus, liked to spend time with her family.

20           And then in 2014, Rodney Mesquias repeatedly  
21 told her that she was going to die. And that was a lie.  
22 It was a dirty, lucrative lie that made the Merida Group  
23 over \$50,000. And that lie had devastating  
24 consequences. Ms. Conti told you she couldn't sleep at  
25 night because she feared that if she went to sleep she



1 would take her last breath. Her son stopped coming  
2 around because he didn't want to see her die.

3 But make no mistake about it, hospice is not  
4 a place for a person like Ms. Conti. When she started  
5 speaking about the corruption, Defendants Mesquias and  
6 McInnis, they tried to bribe her. They tried to give  
7 her a free power wheelchair not even covered by  
8 Medicare, and they got it from a pawnshop, a faulty  
9 wheelchair that almost killed her, crashed in a store.

10 Ms. Conti wasn't on hospice because of a  
11 mistaken prognosis, Ms. Conti wasn't on hospice because  
12 hospice is an inexact science. Ms. Conti was on hospice  
13 because of fraud, plain and simple.

14 Now, these three Defendants, they told lies  
15 for money, and they knew what they were doing. They  
16 knew what they were doing was wrong.

17 How did they know? They were told. Nurse  
18 after nurse, employee after employee told them, I can't  
19 lose my license. These patients don't qualify. This is  
20 fraud.

21 But what Defendant Mesquias and McInnis did,  
22 they fired those nurses, they fired those employees,  
23 they hired new ones. They thought they were above the  
24 law.

25 And you heard directly from Defendant Pena.

1 Ladies and gentlemen, it's not everyday that you get to  
2 see a crime caught on tape. You heard him talk about  
3 how he keeps patients alive on hospice to make more  
4 money.

5           You heard him talk about how he doesn't care  
6 if Medicare requires that a patient on hospice has only  
7 six months to live. He puts patients on hospice, anyone  
8 who has an incurable disease to make money. And you  
9 heard him talk about nurses, nurses don't have the  
10 right, he said, to discharge patients from hospice  
11 because those patients are his property, his money.

12           Ladies and gentlemen, you also heard that  
13 the Defendants tried to game the system. They tried to  
14 game the system by creating boxes and boxes of fake  
15 medical records. They tried to game the system when  
16 they were served -- when they received a subpoena from a  
17 Federal Grand Jury asking them for documents that they  
18 didn't have because they were committing fraud. They  
19 created them.

20           Defendant Pena, when he was interviewed by  
21 the FBI, he lied, and then he tried to obstruct justice  
22 by creating fake contracts, fake documents to interfere,  
23 to obstruct, all to prevent justice from being done.

24           Now, when you game the system, ladies and  
25 gentlemen, you can make a lot of money. Over

1     \$124,000,000 Merida was paid off of over \$150,000,000  
2     billed.

3                   And as Laurie McMillan told you at the  
4     beginning of this case, when you have fraud, it drives  
5     up the cost for everyone. It makes it so those Medicare  
6     funds aren't there for the people who actually need it.

7                   There's nothing wrong with having a condo in  
8     South Padre Island, nothing wrong with going to Vegas  
9     with your friends, there's something wrong with stealing  
10    Medicare money and using those dollars on nightclubs,  
11    fancy cars, tailors to come to the office and make you  
12    nice suits which is what Defendant Mesquias and his  
13    co-conspirators did.

14                  But this case is about something much more  
15    than that. Much more than money, much more than  
16    dollars. It's about vulnerable people, people who had  
17    real health problems, people with Alzheimer's, people  
18    with dementia, people in housing projects, people who  
19    needed care and didn't get the care that they needed and  
20    deserved. Because when Defendant Mesquias and McInnis  
21    looked at these patients, and when Defendant Pena looked  
22    at them, they didn't see people, they saw dollar signs.

23                  You remember witness after witness. Did  
24    Defendant Mesquias ever have any compassion for the  
25    patients? No. McInnis? No.

1           You heard Defendant Pena talk about the  
2 patients. How did they all talk about them? They  
3 talked about them like sources of revenue. And if  
4 there's one shocking thing I think we've learned  
5 together in these couple of weeks is that you can't  
6 trust all doctors, you can't trust all Medicare  
7 providers. Because behind closed doors, there are some  
8 who are willing to break the law and put profit over  
9 patients.

10           Ladies and gentlemen, this morning I'm going  
11 to walk through the charges in the indictment. The  
12 Judge has given you the law that applies to each one of  
13 those charges. I'm going to go through, briefly, the  
14 evidence that supports each one of these charges and why  
15 there's overwhelming evidence that the Government has  
16 proved its case beyond a reasonable doubt.

17           First charge is Conspiracy to Commit Health  
18 Care Fraud. You remember at the beginning of this case,  
19 we've heard a lot about, oh, it's only six patients.  
20 Well, Count One isn't about six patients, it's about a  
21 conspiracy, a conspiracy that began in 2009 and  
22 continued until the close of Merida.

23           Now, what is a conspiracy? A conspiracy is  
24 simply a coming together of people to accomplish an  
25 unlawful act. And in this case, there's no disputing

1 that the three Defendants came together. McInnis and  
2 Mesquias worked together hand-in-hand everyday. And  
3 Pena came together with them at the Merida Group.

4 The only substantive question for you is  
5 whether when they came together were they doing  
6 something unlawful?

7 Now, before we get to that evidence, I want  
8 to take us back to the beginning of the case, to Ms.  
9 McMillan. Ms. McMillan explained to you that Medicare  
10 is a trust-based system to encourage medical care to get  
11 to Medicare beneficiaries. Medicare trusts that these  
12 providers, when they submit an application, when they  
13 make promises to Medicare in those Medicare  
14 certifications, are going to know the rules, are going  
15 to abide by the rules, and agree that they will face  
16 penalties if they don't do so. And once they submit  
17 that application, they're able to send in claims and get  
18 paid without anyone reviewing those medical records  
19 upfront.

20 But Medicare has some very simple rules,  
21 very common sense rules. You can't pay kickbacks and  
22 bribes. What's a kickback? Ms. McMillan explained it's  
23 very simple. It's anything of value that you're giving  
24 in exchange for a patient being referred to a medical  
25 provider. So payments to a medical director, they're in

1 exchange for patients, that's a kickback. Payments,  
2 things of value given to patients to sign up for  
3 services, like power wheelchairs, that's a kickback.  
4 Paying marketers on a per patient basis to go out into  
5 the hospitals, out into the streets and to find  
6 patients, that's a kickback.

7 Medicare has one very simple rule for  
8 kickbacks. You don't pay them. And it has simple rules  
9 hospice. The patient has to be terminal. Six months or  
10 less. Simple rules for home health. You have to be  
11 homebound. You cannot submit claims if the beneficiary  
12 is not homebound.

13 And Ms. McMillan explained that Medicare  
14 would not pay a dime if it knew there were kickbacks, if  
15 it knew that patients didn't qualify for hospice, or if  
16 it knew that patients weren't homebound. And because of  
17 the Defendants' lies in this case, Medicare paid a lot  
18 more than a dime, it paid over \$124,000,000.

19 Now, the Medicare enrollment certifications  
20 are clear. Everyone who signs them agrees to abide by  
21 Medicare's rules. And there's the data interchange  
22 agreement which allow the providers to get paid. Same  
23 rules, claims must be complete, accurate, truthful.

24 Now, Defendant Mesquias, he made a lot of  
25 promises to Medicare. He made promises on 33 separate

1 occasions that he wouldn't pay kickbacks and bribes,  
2 that he would follow Medicare's rules regarding hospice  
3 and home health. And he broke those promises day after  
4 day, month after month, year after year.

5 Henry McInnis made the same promises to  
6 Medicare. He knew what the rules were.

7 Francisco Pena, same thing. And you've  
8 heard a lot about truth-tellers. Truth-tellers being  
9 people who tell the truth. These Defendants lied on  
10 scores of occasions in the agreements they submitted to  
11 Medicare and in every claim they submitted.

12 So how did the fraud work? Fraud was pretty  
13 simple. As Melissa Hernandez told you Defendant  
14 Mesquias would say it, you saw her, she recalled it  
15 vividly, feed the machine, feed the machine, feed the  
16 machine.

17 What did Mesquias mean? The witnesses told  
18 you. Eddie Zuniga told you that when the hospice  
19 program had started they couldn't get very many patients  
20 because there aren't that many patients who are actually  
21 dying, actually have less than six months to live. So  
22 Defendants Mesquias and McInnis came up with a plan.  
23 They came up with a marketing plan. And that plan was  
24 to go out, to tell patient that they didn't have to die  
25 to be on hospice and to offer them free supplies, free

1 inducements to sign up.

2 Now, these patients were lied to. They were  
3 vulnerable, they were indigent and in many cases they  
4 were coming out of hospitals and they were being offered  
5 free things.

6 And you've heard about the evidence of  
7 chaplains, of nurses who would go out and see them and  
8 face the heartbreak of telling these people that they're  
9 going to die. Counseling them on God's plan for death.  
10 It wasn't their time to die. Some patients were being  
11 deceived that they didn't have to die to be on hospice;  
12 other patients were being deceived that they were dying  
13 when they weren't. All to make the Defendants more  
14 money.

15 How did they get the marketers to go out and  
16 do it? There's overwhelming the evidence the way they  
17 did it was they paid the marketers on a per patient  
18 basis. Defendant Mesquias agreed to it, Defendant  
19 McInnis agreed to it. They came together, they offered  
20 the marketers per patient payments, kickbacks, for  
21 patients they brought in.

22 Ladies and gentlemen, that's an agreement,  
23 that's a conspiracy. If you think the Defendants did  
24 that, that alone is sufficient to convict them on Count  
25 One.



1           So they have these marketers going out  
2     there. They're getting patients, patients don't qualify  
3     because they're telling them you don't need to be dying.

4           What do they do when they get their  
5     patients? Well, there's one thing that is very clear  
6     from all the witness testimony, and that is that  
7     Defendant Mesquias ran a tight ship. He made the rules  
8     and Defendant McInnis was his enforcer. He enforced the  
9     rules at Merida Group. And these rules were very  
10    different than Medicare's rules because their rules was  
11    that every referral that comes in from a marketer, they  
12    want admitted.

13           It doesn't matter for hospice whether  
14    patients have six months or less to live. They want  
15    everyone with Alzheimer's on hospice whether or not  
16    they're dying, everyone with CHF whether or not they're  
17    dying, everyone with heart disease, cancer whether or  
18    not they're dying. That's what Mesquias told them,  
19    that's what McInnis told them. That is an agreement, a  
20    coming together to commit fraud, a conspiracy.

21           Martha Ramos told you that Mr. McInnis  
22    talked to her about, let's move these patients from home  
23    health to hospice. And there was a lot of evidence from  
24    and you heard the witnesses in the case. These are two  
25    different programs, two different qualifications, but

1 they would send intake coordinators, marketers,  
2 non-medical professionals to rifle through these files,  
3 find people with diagnoses and move them from the home  
4 health program to the hospice program.

5 Why did Defendant McInnis say they did it?  
6 To make more money. Defendant Mesquias said the same  
7 thing.

8 So they have all these patients, the  
9 patients don't qualify.

10 How do they get them admitted? Another  
11 aspect of the conspiracy was the medical directors. And  
12 you heard from two of the three medical directors on  
13 this screen who have plead guilty and admitting  
14 committing health care fraud with these Defendants.

15 Eduardo Carrillo. He said he was a rubber  
16 stamp. He's not exercising medical decision making.  
17 You heard he would just gets stacks and stacks of paper,  
18 face-to-face visit forms, go ahead and sign them. You  
19 heard there was one time he went out to see patients and  
20 Defendant McInnis said, you don't need to see them at  
21 all, they're across the canal, don't worry about it,  
22 just sign, just sign.

23 Now, you heard a lot about how Defendant  
24 Carrillo was a bad man, about how Defendant Carrillo had  
25 an opioid induced seizure in the Merida offices.

1 Defendant McInnis, Defendant Mesquias, they knew he was  
2 addicted to opioids, they knew he had a serious problem,  
3 did it bother them? Not at all. They had him continue  
4 to sign stacks and stacks of paper, continue to  
5 fabricate documents all so they could make more money.

6 Jesus Virlar. You heard he was despicable.  
7 You heard he was a bad person. You heard his medical  
8 malpractice left a woman in a vegetative state.

9 Jesus Virlar, he's not part of the  
10 Government, Jesus Virlar is their medical director and  
11 they knew, they knew he had left this woman in a  
12 vegetative state; they didn't care.

13 Rodney Mesquias, he set aside a room in his  
14 lake house for him. He let him drive his Porsche. He  
15 let Dr. Virlar fabricate document after document to keep  
16 patients in home health. Keep them on hospice all to  
17 make more money.

18 Now, let's think about some of the things  
19 you've heard. It's been suggested that these men are  
20 liars, these men are -- got into trouble making  
21 everything up. These are common sense, ladies and  
22 gentlemen. For these men to have come into this  
23 courtroom under penalty perjury, said all of these  
24 things about the Merida Group, exposing themselves to  
25 more jail time, their deals being ripped up, and then

1     what happens, turns out that Amber Kelso comes into this  
2     courtroom, says pretty much the same thing that they  
3     did. Melissa Hernandez, Joanne Conti, they didn't  
4     expect her to be alive, walk into this courtroom.  
5     Pretty much the same thing as Dr. Carrillo and  
6     Dr. Virlar, the corruptions, the fraud.

7                 Ladies and gentlemen, for these doctors to  
8     have made up all those things about the Merida Group, to  
9     have lied as the Defendants are suggesting about the  
10    Merida Group and then have everyone else come into the  
11    courtroom and corroborate what they're saying, I mean  
12    they'd have to be the luckiest men in the world.

13                And, ladies and gentlemen, as we know, these  
14    two doctors are not the luckiest men in the world. They  
15    were telling the truth, the truth about Henry McInnis,  
16    the truth about Rodney Mesquias, the truth about  
17    Dr. Pena.

18                And what do we know? Dr. Virlar was the  
19    model. Roland Aguilera told you about that. That's how  
20    Defendant Mesquias talked to -- talked about him. He'd  
21    even send Dr. Virlar to talk to patients and families,  
22    get more people signed up, make more money. He even  
23    went into a side business with him, another clinic.

24                Both those Defendants told you that they  
25    were paid bribes to rubber stamp orders for patients who

1     didn't need it.

2                     And Joe Garza came into this courtroom  
3     charged in this indictment, plead guilty to committing  
4     all the crimes that have been detailed here, the  
5     Conspiracy to Commit Health Care Fraud, sat on that  
6     witness stand, told you about how he's now chopping  
7     lumber, working at a rehab facility. The anguish that  
8     he is in for this role in the fraud. And he  
9     corroborated what those two doctors said. Below  
10    Mesquias, below McInnis, Garza was right below them  
11    receiving the orders, communicating with them on a near  
12    daily basis if not everyday and passing those along to  
13    the rest of the organization.

14                    Now, what was Defendant Pena's role in all  
15    this? Defendant Pena had the same role as Virlar and  
16    Carrillo. As Ernesto Gonzalez told you when he went out  
17    to meet Defendant Pena, Defendant Pena said just go  
18    through my medical records, pick out anyone you want to  
19    put on hospice, go ahead, sign them up with Merida.

20                    Ladies and gentlemen, that's an agreement,  
21    that's a conspiracy right there. Conspiracy with  
22    Defendant's Mesquias and McInnis to sign up patients for  
23    hospice who didn't actually need the services.

24                    You also heard from Jose Aguilar, Roland  
25    Aguilera. Defendant Pena, and this is corroborated by

1 the tapes, in a meeting he's going to boast about  
2 himself, he doesn't care about patients, you're going to  
3 give them a stack of forms, he's going to recertify  
4 every patient for more episodes of home health, more  
5 episodes of hospice. That's the reason the patients end  
6 up on home health and hospice for years. Not because  
7 they need it, but because Virlar, Carrillo, Pena, birds  
8 of the same feather flock together. They recertify  
9 every patient, nearly everyone.

10 And you don't have to take it from these  
11 Defendants because tapes don't lie.

12 (Audio playing.)

13 MR. FOSTER: Leave the six months out  
14 because I don't believe in that. Ladies and gentlemen,  
15 that's the conspiracy right there. Defendant Mesquias  
16 wanted to leave the six months out, Defendant McInnis  
17 directed that people leave the six months thing out of  
18 it.

19 What's the problem with that? Each one of  
20 these Defendants promised to Medicare that the six-month  
21 thing was at the heart of the rules and regulations for  
22 certifying a patient for hospice. And so each time they  
23 submitted one of those enrollment applications, it was  
24 fraud. Each one -- time they came together to do this  
25 plan together, it was a conspiracy to commit fraud. You

1 can't leave the six-month thing out of it, that's fraud.  
2 Punto.

3 (Audio playing.)

4 MR. FOSTER: What's going on here? They're  
5 talking about a nurse, a nurse who saw the patients that  
6 Defendant Pena was referring and discharged them.

7 What's his reaction? He's not concerned,  
8 he's not worried about, oh, maybe these patients didn't  
9 qualify. He says, she doesn't have the right because he  
10 views these patients as property. Same mentality that  
11 Rodney Mesquias had, same mentality that Henry McInnis  
12 has. Nurses don't have the right to tell us patients  
13 don't qualify because these are valuable, these Medicare  
14 numbers, not even people, are valuable. They're money,  
15 not people.

16 And Joe Aguilar talked about this and it was  
17 anguishing. He sat there and you had the opportunity to  
18 observe him, and you can Judge for yourself, but there  
19 was real torment there because when patients are in  
20 their dying days, when families are vulnerable, and when  
21 Defendant Pena comes to them, puts them in a panic, we  
22 all know that people can be kept alive on machines, you  
23 can keep people alive on peg tubes and trach's,  
24 artificial ways of extending the life process. That's  
25 not what's right for the families, that's not what's

1 right for the patients. It's what Defendant Pena did to  
2 make more money for himself and for every co-conspirator  
3 hospice like the Merida Group that he worked with.

4 Now, these Defendants weren't alone. You've  
5 heard about some of the medical directors, you've seen  
6 some of the medical directors, but there were others  
7 involved in the fraud, too. Dr. Pelly, you eat what you  
8 kill. Dr. Gonzaba insisting on getting paid for his  
9 patients. Fraudulently documenting patients who didn't  
10 meet hospice criteria. You remember Amber Kelso. She  
11 said that when she quit the Merida Group, she went to go  
12 see Dr. Gonzaba and he confessed to her, he said, I know  
13 what they're doing is wrong, I would like to leave, too,  
14 but I'm scared of Rodney.

15 Dr. Posada, he goes to Vegas with the boys.  
16 Defendant Mesquias wants Dr. Virlar to teach Dr. Posada  
17 how to commit the fraud, how to take these patients who  
18 are on managed care, not traditional Medicare, managed  
19 care which means the Government gives you a contract and  
20 they say, if you keep costs down, you get to keep the  
21 savings, the amount between what the contract is and how  
22 much you save.

23 Dr. Virlar explained to you how the fraud  
24 works. The way you do it is you take the patients who  
25 are high cost, not necessarily dying, but they want



1 medications, they want supplies, they're costing some  
2 money and you can dump them on the hospice program  
3 because that way Medicare pays for it, the company, Well  
4 Med, they don't pay for it. Virilar gets bonuses, Posada  
5 gets bonuses, Gonzaba gets bonuses, everyone profits  
6 except the patients, except the Medicare program.

7 Zertuche, another doctor you heard about  
8 involved in the fraud, another medical director involved  
9 in the fraud.

10 So, ladies and gentlemen, was this just a  
11 difference of opinion? And I want to make one thing  
12 clear when we talk about this. The Defense has no  
13 burden of proof, the Government has the burden at all  
14 times. And we embrace that burden to prove that these  
15 crimes occurred beyond a reasonable doubt.

16 But when the Defense raises arguments, when  
17 they make claims, the Judge will instruct you you're  
18 entitled to use your common sense. You're entitled to  
19 hold those claims up and scrutinize them with common  
20 sense.

21 What does common sense mean? That just  
22 means the type of judgment that you would use everyday  
23 in your day-to-day life.

24 And there's one very simple question that  
25 you might ask yourself using common sense at the end of

1 the day. Is the evidence that you've heard in these  
2 past two weeks consistent with a legitimate hospice  
3 company and a legitimate medical director trying to  
4 provide care for their patients? Or is it consistent  
5 with a hospice company and a medical director trying to  
6 make money off their patients and conceal it from the  
7 Government? Use your common sense, ladies and  
8 gentlemen.

9 This isn't a case about difference of  
10 opinion. Defendant Mesquias would say at the management  
11 meetings with Defendant McInnis "the longer you keep  
12 them on hospice, the more money you make." They weren't  
13 trying to go out and get medical opinions, they were  
14 trying to keep patients on hospice as long as possible.

15 And Defendant Mesquias would say things, say  
16 things that honestly would be shocking if we hadn't  
17 heard them from nearly a dozen witnesses. Every time  
18 someone wanted to not admit or discharge a patient, he  
19 would yell, he would scream, he would say "don't fuck  
20 with my patients, don't fuck with my money."

21 Ladies and gentlemen, that's not the type of  
22 talk that occurs at a legitimate medical provider. It's  
23 not the type of talk, frankly, that should occur  
24 anywhere. And you heard that the employees were  
25 terrified of him, they were afraid that they would lose

1     their job if they didn't follow his Instructions to  
2     commit fraud. So some employees quit, some employees  
3     stayed and helped Defendant McInnis and Mesquias commit  
4     fraud because their livelihood depended on it.

5             And this isn't about difference of opinions  
6     because only one opinion matters and that opinion was  
7     the patient's qualified. Someone came back with an  
8     opinion that the patients didn't qualify, one, they'd be  
9     fired, and, two, Defendant McInnis would say get another  
10    nurse, have that nurse go qualify them. Defendant  
11    Mesquias would say get another nurse, have that nurse go  
12    qualify them. That's not a legitimate difference of  
13    opinion. If every time you hear an opinion you don't  
14    like, you tell someone they'll be fired until they give  
15    you the one that you want to hear.

16            And it's not a difference of opinion if you  
17    cut primary care doctors out of the process. It's not a  
18    difference of opinion if you receive complaints day  
19    after day, week after week, month after month, year  
20    after year. These Defendants knew the patients didn't  
21    qualify but they didn't care.

22            Belinda Gonzalez told you, she wasn't  
23    exercising her medical judgment, she felt more like a  
24    body with a license being put in place.

25            Ricardo Escamilla, Alvio Gonzalez, doctors,

1 you heard the cross-examination. I don't have to repeat  
2 it. You heard it time after time, witness after  
3 witness, prognosis, not diagnosis, inexact science,  
4 etcetera, etcetera, and every witness said the same  
5 thing.

6 Now, there are rules, there's objective  
7 medicine. Think about what they're saying. They're  
8 essentially suggesting no one can ever commit fraud  
9 because it's just an opinion. That is not why Medicare  
10 has detailed rules and regulations, that is not why  
11 there's the entire science of medicine, clinical  
12 evidence, and it is not what accounts for why patients  
13 were on hospice for years at the Merida Group.

14 Why else is this not about difference of  
15 opinion? Well, Defendants fabricated the medical  
16 records. They directed nurses and doctors to create  
17 fake diagnoses and to create medical conditions that  
18 made it look like the patients were sicker than they  
19 actually were.

20 And Dr. Escamilla told you when he actually  
21 went out and saw these patients they looked nothing like  
22 what you would have expected if you had gone by what was  
23 in these patient files. You can't trust these patient  
24 files, ladies and gentlemen. Witness after witness has  
25 told you that.

1           You also heard a lot about cherry picking,  
2   six patients. Witness after witness told you the huge  
3   percentages of these patients didn't qualify for -- for  
4   services. Not six patients, hundreds upon hundreds upon  
5   hundreds upon thousands of them. And Special Agent  
6   Williams explained to you what the data showed. 78  
7   percent of the billing that was done at Professional  
8   Hospice Care was for patients who were on hospice for  
9   over six months and over one year. That equaled to over  
10   half the billing, or a little less than half the  
11   billing -- excuse me, patients who were certified to die  
12   within six months. And of course a few here, a few  
13   there can live a little longer than six months, you  
14   heard testimony about that. One or two here, one or two  
15   there that's not a federal case.

16           But when there is a plan and a policy to put  
17   patients on hospice longer than six months, that's a  
18   Conspiracy to Commit Health Care Fraud. And you know  
19   Medicare reviewed claims. Ms. McMillan told you about  
20   that. They found that 97, over 97 percent of the claims  
21   that were committed didn't satisfy Medicare's  
22   requirements.

23           And it wasn't cherry picking. You saw  
24   Dr. Virlar, you saw Dr. Carrillo, you saw Joe Garza,  
25   they drew circles all over this map to show where the

1 fraud was, covered nearly the whole State of Texas, even  
2 places we don't have on the map showing that it was a  
3 massive fraud.

4 And as you heard Defendant McInnis and  
5 Mesquias they wanted uniformity, they wanted the rules  
6 to be the same in every location. And the Judge has  
7 instructed you, it isn't about the number of witnesses  
8 that come into Court, if we had to bring a witness into  
9 Court from every location, we'd be here for a long time,  
10 ladies and gentlemen. You can assess the evidence and  
11 based on the evidence determine that this was a  
12 widespread fraud.

13 And that's what the instruction shows.  
14 Government's not required to prove that every claim  
15 submit was fraudulent, we're just required to prove that  
16 the Defendant's intended to get more than they were  
17 entitled to.

18 Sure, some patients were ill, some patients  
19 probably qualified for these services, clearly not a  
20 lot, but some. The problem was the Defendants got  
21 greedy. They tried to get more patients more money that  
22 they weren't entitled to.

23 Another part of the conspiracy is intending  
24 to join it, intending to be part of it. And it's pretty  
25 simple here. Dr. Carrillo told you all about that. The

1 first time he goes out he tries to assess the patients.  
2 He says some don't qualify. He comes back, he's told  
3 no, no, no, don't do that. You're not going to get  
4 paid. You're not going to get paid unless you recertify  
5 every one of them. And he's told, don't do those  
6 examinations, take this pamphlet. This pamphlet shows  
7 exactly what Medicare requires. And they didn't want  
8 him to go out and assess the patient, they wanted every  
9 patient file to reflect this medical information.

10 Now, Defendant Mesquias, Defendant McInnis,  
11 they didn't see the patients, they didn't know what  
12 condition the patients were in. When they came together  
13 and gave those Instructions, that was a conspiracy, that  
14 was an agreement, that was health care fraud. And Joe  
15 Garza, he corroborated what Dr. Carrillo said about that  
16 meeting. Same thing, this is what the Defendants  
17 wanted.

18 Janina Gonzalez, she told you, too, they  
19 were trying to create health care fraudulent records to  
20 defeat audits, to defeat this day from ever happening.

21 And they admitted it. Defendant McInnis  
22 told Mr. Garza, Medicare is seeking money back, what's  
23 the reason? We're keeping them on services so long,  
24 it's not the right thing to do. And you heard, did they  
25 change what they were doing, did they change the

1 marketing plan, the admissions plan, change keeping  
2 people on hospice? No. They knew it was the wrong  
3 thing and they continued the fraud.

4 Now, Counts Two through Seven are the  
5 substantive offenses of health care fraud for each  
6 beneficiary.

7 Count Two is Jack High. Now, Jack High was  
8 certified by Dr. Virlar for the claims specified in  
9 Count Two for unspecified debility, which Dr. Virlar and  
10 others testified is basically a made-up diagnosis.

11 And what do we know about Jack High? He was  
12 on hospice for a ridiculous amount of time, over four  
13 years. And you've heard from Amber Kelso, after Merida  
14 shut down, they tried to transfer him to another  
15 hospice. Another hospice wouldn't take him because he  
16 didn't qualify.

17 Amber Kelso told you about Jack High. He  
18 was out there dancing the Macarena. Never qualified for  
19 hospice during the entire time she saw him. This is  
20 ridiculous.

21 Ricardo Escamilla. First time he's provided  
22 with the recertification papers, he recertifies him  
23 based on what's in the file, those lies that contaminate  
24 the medical records.

25 But then he finds out Jack High doesn't



1     qualify. He's out there walking, he has a little  
2     Alzheimer's but you do not get put on if you have  
3     Alzheimer's. It doesn't mean you're dying. What  
4     happens after he re -- refuses to recertify him?  
5     Defendant Mesquias gets Dr. Virlar to recertify him.  
6     It's not a difference of opinion, that's fraud.

7                 Francisca Perez. Now, Ms. Perez is  
8     certified by Defendant Pena. And she's certified for  
9     chronic respiratory failure. But what do we know? The  
10    nursing home that Ms. Perez is in doesn't have that  
11    diagnosis at all. And when you look at the IDG notes,  
12    her oxygen is fine. She's not having respiratory  
13    failure. She has a lot of health issues, sure, but  
14    she's not dying. She's kept on hospice for three years.

15                And what do we know? She's still alive  
16    today. Special Agent Williams went out and saw her in  
17    2017, went out and saw her two years later in 2019, she  
18    recognized him, El Guero, and she looked about the same  
19    today as she did then. Not dying, chronically ill,  
20    sure, but not suitable for hospice.

21                Teresa Calvillo on hospice for three years.  
22    Still alive today. Certified by Dr. Virlar, COPD. He  
23    told you that was false and fraudulent.

24                Now, what do we learn when we look at Teresa  
25    Calvillo's files? And I think this is really telling,

1 ladies and gentlemen, because it shows that these  
2 Defendants were just making stuff up. They were just  
3 making stuff up to make money. So we have one time  
4 she's certified for COPD. We have another time that  
5 she's certified for chronic airway obstruction with a  
6 secondary condition of Parkinson's disease, which she  
7 never had. We have another certification dementia  
8 unspecified and then one COPD.

9 Dr. Virlar, Dr. Carrillo creating these fake  
10 medical records like all the other doctors at the Merida  
11 Group.

12 And I -- I think that this was a -- a moment  
13 at the trial that bears notice because you might  
14 remember that Mr. Canales was cross-examining a witness  
15 about Teresa Calvillo. And he showed the witness a  
16 patient file, a note that said from Ms. Redway patient  
17 is not appropriate for hospice. And he tried to get the  
18 witness to agree that this was a textbook case of  
19 hospice, patient was not appropriate, she came off  
20 services.

21 But the defense didn't show the witness what  
22 happened next. And what happened next was after Ms.  
23 Redway said that Ms. Calvillo shouldn't be on hospice,  
24 not dying, doesn't need the services, the Defendants had  
25 Dr. Virlar sign her up for another episode of hospice,

1 one that stretched two more years, one that made the  
2 Defendants over \$154,000 based off Ms. Calvillo alone.

3 Arcadio Castaneda. On hospice for a little  
4 under three years, still alive today. Certified by  
5 Dr. Virlar. He testified it's false and fraudulent.

6 You can look at these files. He's being  
7 certified for congestive heart failure. Doctor's  
8 patient files show he has no significant congestive  
9 heart failure findings.

10 And what do we know about Mr. Castaneda?  
11 Chaplains are going out to see him. Speaks only  
12 Spanish, he's being counseled on end of life services.  
13 End of life services that he didn't need because he  
14 wasn't dying.

15 Melissa Hernandez. When we pull up the  
16 picture of Mr. Castaneda, she laughs, it's ridiculous.  
17 He's out there walking, driving, he didn't qualify.

18 Count Six, Ms. Cerda. In the middle, this  
19 is the certification for the counts from Dr. Pelly  
20 Alzheimer's disease unspecified. You see in the notes  
21 she's hanging clothes on the line outside, she's out  
22 gardening, she's not dying from Alzheimer's disease.

23 Dr. Gonzalez, he came into this courtroom,  
24 you saw him. He told the Judge he was passionate about  
25 his patients. And she never had a terminal condition.

1 They signed her up without his knowledge, without  
2 consulting with him, without keeping him in the loop.  
3 She was never going to die within six months and she's  
4 still alive today.

5 THE COURT: And you have about ten minutes  
6 in your first hour.

7 MR. FOSTER: Thank you.

8 Joe Garza told you the same thing. She  
9 didn't qualify for hospice care.

10 Joanne Conti, I talked about her. You saw  
11 her in this courtroom. Lies in her file, lung disease.

12 Ernesto Gonzalez told you he recommended her  
13 for home health, but Defendant Mesquias said, no, she  
14 should be put on hospice, that's where we make more  
15 money. And she was on hospice for yearly two years,  
16 over \$50,000.

17 And Defendant Mesquias when she said she  
18 didn't want to be on hospice, he told her she had to be.  
19 He was her hostage.

20 How ridiculous are these patient files?  
21 They said she was comatose, they said she was cachectic,  
22 which means skin and bones, dying because of wasting  
23 away. That's how pervasive the fraud is.

24 Now, the Defendants don't have to do  
25 everything in the conspiracy. You'll receive

1 Instructions on conspiracy and aiding and abetting.  
2 They don't have to press the button on the claims, they  
3 don't have to admit every patient, what is important is  
4 they controlled the admission and discharge of every  
5 patient at the Merida Group. And they made money.

6 Now, there's no requirement that we have to  
7 prove that they made a certain amount of money.

8 They could have committed this fraud for  
9 other reasons: To be in the inner circle, to get extra  
10 cash, to get the power, to get the perks. And we know  
11 that Defendant Pena, he would take a dollar any place he  
12 could get it. It might not be a lot of money, but it's  
13 easy money. Just sign the stacks of paperwork, get in  
14 extra cash.

15 Now, the indictment also charges a  
16 Conspiracy to Commit Money Laundering. And the money  
17 laundering conspiracy is pretty simple. What happens is  
18 you get fraudulently obtained proceeds from the health  
19 care fraud scheme and you transfer them in various  
20 different ways. One way is called promotion, to promote  
21 the continuation of the fraud; another way is called  
22 concealment; and the third way is called spending.

23 And you saw this chart before. When the  
24 money comes in, it goes out to promote, to continue the  
25 fraud in more areas of the company.

1           One of the ways it continues the fraud is  
2 through kickbacks to the physicians, to Dr. Virlar, to  
3 Dr. Pena. The Medicare money comes in based on the  
4 health care fraud they're committing and then it goes  
5 out to them in the form of kickbacks to sign up more  
6 patients, to promote that conspiracy.

7           There's also concealment. We'll talk about  
8 this in the kickback count, but they conceal the  
9 kickback scheme that's occurring with these fake and  
10 fraudulent contracts. Contracts themselves even say  
11 compensation can't be tied in any way to the referral of  
12 patients, but you hear how they talk about it. You hear  
13 how they talk about what this money is really for. It's  
14 for patients, not for providing services, and you don't  
15 get paid unless you play your role in the scheme.

16           Micaela Wooten, you heard about her.  
17 19-year-old girlfriend of Dr. Virlar's. Gets paid over  
18 \$414,000, named as the owner of Professional Hospice and  
19 fraudulent documents signed by Mesquias. That's to  
20 conceal the fraud. The last theory of money laundering  
21 is spending. If you have unlawful proceeds and you  
22 spend over \$10,000, that's a crime, and there's a lots  
23 of those examples. Lots of those examples.

24           And what that money was used for, private  
25 security, fancy nightclubs, San Antonio Spurs tickets,

1 the perks of the fraud. Cars for Defendant Mesquias,  
2 cars for Defendant McInnis, cars for Defendant Pena.  
3 All with Medicare money, all with the proceeds of fraud.

4 Now, Counts Nine and Ten charge Obstruction  
5 of Health Care Investigations and False Statements for  
6 Defendant Pena.

7 And here, the tapes really don't lie.

8 (Audio playing.)

9 MR. FOSTER: Never. It's not what Ernesto  
10 told you, it's not what Roland Aguilera told you, it's  
11 not what Jose Aguilar told you. Defendant Pena wants  
12 payment for patients. That was a lie.

13 (Audio playing.)

14 MR. FOSTER: This is how these Defendants  
15 talk when they're not in the courtroom, not about  
16 services, not about sham medical director agreements,  
17 about payments for patients, kickbacks and bribes.

18 What other false statements did he make?

19 (Audio playing.)

20 MR. FOSTER: We know that's a false  
21 statement, Francisca Perez. We know that's a false  
22 statement because of all the other patients you heard  
23 about. When Defendant Pena's at IDG meetings he signs  
24 whatever paper is put in front of him, it doesn't matter  
25 whether they qualify for services.

1                   What else did he lie about?

2                   (Audio playing.)

3                   MR. FOSTER: We know the way these  
4 Defendants make money, and we know that they lied, that  
5 Defendant Pena lied when the FBI came to talk to him  
6 because he knew what he was doing was wrong.

7                   (Audio playing.)

8                   MR. FOSTER: It's not ethical, ladies and  
9 gentlemen, but the Defendant did it. You can see right  
10 here on the screen. He discharged Francisca Perez from  
11 Merida Hospice to CIMA Hospice, transferring her,  
12 unethical. We know why the Defendant transfers  
13 patients, to make money. He says if he doesn't get  
14 paid, he'll move his patients.

15                  And what does he do? We don't need to play  
16 these, they're -- what does he do after the FBI comes  
17 and interviews him? Within a few minutes, he's on the  
18 phone with that FBI source, he's talking to him, FBI is  
19 out there and then they have this subsequent meeting  
20 where Defendant Pena tries to obstruct the crime. He  
21 admits it looks bad, he's saying we need to cover it up  
22 with these fake medical director agreements so it looks  
23 like we're not paying for patients. He's worried. Who  
24 started this? How do we stop this? How do we interfere  
25 with the investigation?



1                   Now, Defendants McInnis and Mesquias, they  
2                   did the same thing. They conspired to obstruct justice.  
3                   They received that subpoena, that subpoena for patient  
4                   records, and they had a problem. And we all know what  
5                   the problem was, the problem was they had been billing  
6                   Medicare for services without having the necessary  
7                   documents, certificates of terminal illness,  
8                   face-to-face sheets, all those documents that Medicare  
9                   requires be completed before the claim is submitted.

10                   And so what do they do? They create these  
11                   records. Roland Aguilera gets on the phone with  
12                   Defendant McInnis and Mesquias. They say go find them.  
13                   He tries to find them, they don't exist. And at that  
14                   point they have a choice. They could tell the truth to  
15                   the Government, they could say we don't have these  
16                   records, they could try and pay that money back, they  
17                   could do lots of things. But they made a different  
18                   choice and for Defendant McInnis and Defendant Mesquias  
19                   it was a criminal choice. They said have Dr. Virlar  
20                   create those records. Records going back to 2011, six  
21                   years before, having them certify that patients in 2011  
22                   were going to die in six months when they were still  
23                   alive on that day in 2017.

24                   And this was a pervasive practice at the  
25                   Merida Group. Ernesto Gonzalez talked about it.

1 Documents weren't being done, they just have medical  
2 directors create them out of whole cloth.

3 Now, ladies and gentlemen, the last count  
4 charged in the indictment is the kickback conspiracy.  
5 And you've heard a lot about it already. The other  
6 medical directors have told you that's what they were  
7 involved in. Defendant Pena has talked about the way he  
8 does business.

9 And does anyone think that the man you heard  
10 on those tapes, when he was having private conversations  
11 with Defendant Mesquias, wasn't speaking exactly the  
12 same type of way?

13 Joe Aguilar told you he always talks about  
14 money, about his schemes.

15 Jesus Virlar explained Defendant Pena's was  
16 the same as his. He went down there, he talked to  
17 Defendant Pena, and Defendant Pena was pretty blunt.  
18 I'm not sending patients until I get paid.

19 Roland Aguilera, he corroborated that  
20 testimony. Said Rodney wants all the money. He wants  
21 money and he's not paying me enough for patients. What  
22 do you think about that? It's obvious, this is fraud.

23 And you've seen these checks supposedly  
24 Merida Group's medical directorships. And there's an  
25 instruction that there's a safe harbor for legitimate

1 medical director agreements. The problem is that in  
2 this case that instruction doesn't apply at all because  
3 these weren't real medical director agreements.

4 And what the instruction tells you is the  
5 safe harbor doesn't apply if the relationship takes into  
6 account in any way the value or volume of patient  
7 referrals. And that's what was going on here. Medical  
8 directors didn't get paid if they didn't send patients.  
9 So there's no safe harbor for that type of relationship.

10 And let's talk about these contracts. On  
11 one side here we have Defendant Pena's contract, Exhibit  
12 4; on the other side here we have Dr. Escamilla's  
13 contract, Exhibit 200. Looking at these on their face  
14 you might think, oh, these are legitimate. But in  
15 reality, these are just pieces of paper. And if people  
16 aren't following what's written on the paper, then none  
17 of these words are worth the paper they're written on.

18 Dr. Escamilla, he has nothing to gain here.  
19 He came here and he told you, Defendant Mesquias fired  
20 him for not referring patients. He thought most of the  
21 patients were fraudulent, he tried to discharge them,  
22 Defendant Mesquias didn't like that so he got rid of  
23 him.

24 Now, ladies and gentlemen, as I said, the  
25 Defendants had choices. Every step of the way, they had

1 choices. When a nurse came to them and said this  
2 patient doesn't qualify, Defendant McInnis, Defendant  
3 Mesquias had the choice to say, okay, fair enough, let's  
4 stick to real patients.

5 Every time a medical director wanted money  
6 for referrals, they had the choice to say, no, we only  
7 pay for legitimate medical director choices.

8 And Defendant Pena when the FBI came to see  
9 him, he had a choose, too, tell the truth, cooperate in  
10 the investigation.

11 But each one of these Defendants made a  
12 different choice, they made a criminal choice, and that  
13 choice didn't only impact them, it impacted each one of  
14 the patients that we've heard about in the courtroom  
15 today.

16 Because as you've heard, if patients are put  
17 on hospice too early, they waive their rights to  
18 curative medical treatment. They can't get physical  
19 therapy they need. They can't see the Alzheimer's  
20 specialist they need. If they have shortness of breath,  
21 they can't get help, like Richard McDonald the patient  
22 that Ms. Kelso told you about who wanted to see his  
23 grandchildren, who wanted to live, whose primary care  
24 doctor said take him off services. And the Defendants  
25 they refused to at the cost of his health.

1           And as you heard, if patients are put on  
2 hospice too early, that means later on if they actually  
3 need legitimate hospice services, agencies won't want to  
4 take them. A lot of their benefits have been used up,  
5 there's a lower reimbursement amount. It is to their  
6 detriment.

7           These patients, Jack High, Joanne Conti,  
8 Mr. Castaneda, Ms. Perez, all the patients you've heard  
9 about in this courtroom, the Defendants viewed them as  
10 property, not people.

11           And you have an opportunity, ladies and  
12 gentlemen, you have an opportunity to give them a voice,  
13 you have an opportunity to say their names, and you have  
14 the opportunity to say the only word that is appropriate  
15 given the mountain of evidence before you, and that word  
16 is guilty of all counts.

17           Thank you.

18           THE COURT: Thank you, Mr. Foster.

19           All right. The Government used an hour and  
20 seven minutes, Mr. Lowell you'll have 23 minutes  
21 remaining.

22           Ladies and gentlemen, let's take a very  
23 brief recess before we start up again.

24           (COURT IN SHORT RECESS.)

25           COURT OFFICER: All rise for the jury.

1 (JURY OUT.)

2 THE COURT: Thank you, everyone.

3 Everyone please be seated. We'll be in  
4 recess.

5 (COURT IN SHORT RECESS.)

6 COURT OFFICER: All rise for the jury.

7 (JURY IN.)

8 THE COURT: Thank you, everyone. Please be  
9 seated.

10 Let me know when you're ready, Mr. Canales.  
11 You want a ten-minute warning?

12 MR. HECTOR CANALES: Yes, sir.

13 THE COURT: Let's get everybody situated.  
14 All right. Mr. Canales, whenever you're  
15 ready.

16 MR. HECTOR CANALES: Thank you, Your Honor.  
17 May it please the Court, opposing counsel, ladies and  
18 gentlemen of the jury.

19 Before I get into response to what you just  
20 heard, and -- and go through the testimony, the actual  
21 testimony and evidence in this case, on behalf of  
22 Rodney, his wife Tammy, his mother Bea, his two sons, I  
23 want to sincerely thank you for your services as a  
24 juror.

25 Second to serving in our Armed Forces, in my

1 view there's nothing more patriotic, or nothing more  
2 citizen and more American than serving as a juror. And  
3 I know that's a little, you know, hokey, but it's true,  
4 in my opinion.

5 For 20 years I've been trying cases with my  
6 father, who's been trying cases for 50 years, and this  
7 system of justice is unique to our country. And it  
8 empowers citizens to judge, to evaluate testimony. Not  
9 just what's said, how it's said. The manner in which  
10 it's said, the manner in which it's brought. There's a  
11 lot of things to it. If you just put things on paper,  
12 right, or if you just have lawyers get up there and talk  
13 about it, it's not enough. It's about what comes from  
14 that chair and it's about the documents.

15 Testimony, evidence has multiple forms,  
16 right? Not just the words, but what's on the page. And  
17 then it's also important, and you're going to see, we're  
18 going to go over some Instructions and things, you're  
19 going to see that, you know, I guess turning to a little  
20 bit here to a response.

21 I guess, if you, nowadays, if you just say  
22 it enough, loudly enough in the right form, looking the  
23 right way, it must be true, right? If you just make the  
24 allegations, general allegations and you say it over and  
25 over and over and over and you market that message and

1 that thing over and over, well, it must be true. We all  
2 know that's not the case, but that's the world we live  
3 in today. And the Government isn't any less immune to  
4 that and to try to appeal to that nature of us than  
5 anybody else.

6 But it's different. This is a different  
7 world. This is a system that looks behind it and  
8 underneath it. So you already know what's about to  
9 happen. You saw what just happened up there couldn't  
10 have been, as I was sitting there thinking, I said, man,  
11 I've seen this movie before. I -- this is exactly,  
12 right, the statements that were made in here, that movie  
13 has been played for and that's what we saw for the last  
14 two weeks. Witnesses would come up, give these broad  
15 stroke generalizations, unsupported, uncorroborated  
16 testimony, generalizations about conspiracy, oh, 80  
17 percent, 50 percent, 70 percent. And then what happened  
18 with every single witness? It fell apart.

19 Another side. And we've all heard about it,  
20 and I think we mentioned this in either voir dire or in  
21 opening, we've all heard of the two sides to every  
22 story. It's true. It's true.

23 But in our system here, there's a third  
24 side. The third side, right, it's their side, our side,  
25 the side that comes out here in this room. The side



1     that comes out in Court, the third side through  
2     Cross-Examination. The truth is revealed through cross.  
3     And each and everyone of these witnesses, and I guess so  
4     right now the Government, you come out and make these  
5     general allegations, you wrap the American flag around  
6     Jose Virlar and you dangle to him a promise, a hope, the  
7     potential, remember that? The potential for lesser  
8     sentence for crimes that have nothing to do with my --  
9     my client. That's all it takes I guess nowadays.

10                 I hope not. I hope, and I -- and I have  
11     faith, I have faith in the system and I have faith in  
12     you that you will follow the Court's instruction, that  
13     you will hold the Government to its burden. Not to this  
14     marketing generalization, but you're going to hold them  
15     to their burden.

16                 Because, you know, this case, this case is  
17     not about Spurs tickets, lifestyle, personalities,  
18     whether somebody yells or curses or not, it's not about  
19     those things. This case to you, ladies and gentlemen,  
20     at its core, it's about six patients. It's about six  
21     patients, you know. And the Government when they put  
22     these cases together, it's their choice, they decide how  
23     to order things, right?

24                 So even though we're dealing with how this  
25     case, I submit to you, is about Counts Two to Seven.

1 That is the foundation of what they're attempting and  
2 they have failed miserably to meet their burden to do.  
3 It starts with those. Those patients, those counts,  
4 they don't meet their burden, everything else crumbles.  
5 You cannot build a house on a weak foundation. And I  
6 submit to you we're going to go through the documents  
7 here, we're going go to go through it, and I told you at  
8 the very beginning in opening that it was going to be  
9 tedious, that there was going to be some detail. And I  
10 hope that we try to do this and present this case in the  
11 most efficient way that we could. But there's no  
12 getting around it, even though they want to, look at all  
13 those boxes over there. Remember I rolled up here,  
14 right, put all that stuff up there, we went through it  
15 they never did. You know what's going to happen? Just  
16 like it did in trial, you know what's going to happen  
17 next? When we're all finished here, the Government gets  
18 the last say because they have the burden.

19 Mr. Lowell is going to get up here and he's  
20 going to have, you know, 15 or 20 minutes, or so to  
21 talk.

22 You know what's going to happen? The same  
23 thing that happened in the trial. There's going to be a  
24 scramble and all of a sudden they're going to try to  
25 respond and try to put up documents. But they don't put

1 it up when they're supposed to. Only if a -- only as a  
2 reaction. And that tells you, ladies and gentlemen, a  
3 lot about the proof in this case.

4 I apologize I'm going to do my best to stand  
5 over here to try to not give my back to anybody.

6 All right. Let me show you the first slide  
7 here. You're right they cherry picked. Kind of going  
8 backwards. We had a witness, a \$250,000 witness to come  
9 in here to tell us, to show to us that these six  
10 patients -- that these six patients right here represent  
11 .06 percent.

12 Or, in other words there was 9,339 patients  
13 out there, that was the entire world of Merida, that's a  
14 combination, folks, of hospice and home health. Maybe  
15 it was intentional, maybe it was unintentional, I don't  
16 know what happened there --

17 COURT REPORTER: I'm sorry, Mr. Canales. I  
18 apologize. There was coughing over your talking. Start  
19 over with intentional.

20 MR. HECTOR CANALES: Maybe it was  
21 intentional, unintentional.

22 COURT REPORTER: Thank you.

23 MR. HECTOR CANALES: The confusion of the  
24 requirements of home health, you have to be homebound  
25 versus hospice, terminally ill.

1           These are not minor differences in terms of  
2 what the criteria is. This particular case, Counts Two  
3 to Seven we'll show you in a second is all hospice. The  
4 home health issue, there's no evidence about it. Two to  
5 seven, they picked.

6           This table, this Government with its  
7 unlimited resources and unlimited abilities chose, I  
8 don't know why, six patients out of 9,339. And they  
9 just didn't stop at those six, within those six, they  
10 chose specific either 90-day period or 60-day period and  
11 said those periods are fraud.

12           Why they don't come in and -- and say that,  
13 instead, oh, it's just general, you know, it's easy.  
14 They're counting, they're counting on you not holding  
15 them to their burden and just saying, close enough, good  
16 enough.

17           We know that these six are not  
18 representative of the whole. The \$250,000 statistician  
19 didn't perform any statistics, didn't go in there and  
20 say, well -- out of these, let's figure out -- let's  
21 gets a representative sample of the whole group, right?  
22 Because in order to -- to determine if these six can  
23 tell us anything about the -- the rest, about any other  
24 fraud, right, you've got to have -- you've got to get --  
25 make sure that they are representative of the group.

1 But they're not.

2 We talked about -- you're right, we made a  
3 big deal about diagnosis and prognosis. Why? Because  
4 it's part of the program. Right? Because a diagnosis  
5 is a fact. And we're going to show you, I'm going to go  
6 through in detail, again, like we did here, I'm going to  
7 show you these diagnosis of these patients were real.  
8 And they came from doctors, not from Virlar or Carrillo,  
9 not from doctors who were indicted, right, they came  
10 from hospitals and other doctors who the Government has  
11 not made a single allegation in this case.

12 You know who has? Dr. Virlar's buddies, his  
13 best man, his silent business partners. They've come in  
14 and said stuff. Uncorroborated without any support,  
15 they just throw the mud up on the wall and hope it  
16 sticks.

17 Well, that's not enough. That's not proof  
18 beyond a reasonable doubt.

19 Dr. Virlar and his -- and his buddies aren't  
20 subject to belief. These are not men that you would  
21 trust to tell you to cross the street if something was  
22 in it for them. You wouldn't trust these men right now  
23 with the matters of -- of importance in your life. Of  
24 course not. As it relates to your family and to your  
25 children, to your loved ones or your own personal

1 safety. Of course not.

2 And therefore, they can't be trusted here to  
3 support what the Government wants. You know what,  
4 because they have embraced them. They've adopted him.  
5 They want you to believe and say what he says is the  
6 truth. I sat there in shock. Mr. Foster gets up there  
7 and says, oh, but he -- he -- he swore an oath to the  
8 United States. It's like -- it's like hearing a -- it's  
9 like, you know, oh, oh, you know, oh, honey, I won't do  
10 it again, I mean it this time. He believes that. You  
11 know what, he has to. He better because he put him up  
12 there as a Government witness.

13 Doctors and nurses with different prognosis,  
14 prescription/opinion is not fraud. I apologize it's  
15 hard to read in here with the -- with all the lights  
16 it's -- it's bright, but what we have here is  
17 Dr. Gonzalez, a portion from Dr. Gonzalez' testimony.

18 Have you ever had another doctor disagree  
19 with you?

20 Yes, sir.

21 Has a difference of opinion about a  
22 patient's prognosis over one another?

23 Yes, sir.

24 Melissa Hernandez, as a nurse said the same  
25 thing. A nurse can have two different opinions or

1 prognosis about a patient.

2 Yes.

3 And they can both be right.

4 Remember that testimony? Why is that  
5 important? It's important because there's a couple of  
6 steps that the Government has to prove here in order to  
7 show that these -- these -- these patients were  
8 fraudulently admitted into hospice.

9 But it's undeniable that within the hospice  
10 program, hospice program depends upon an opinion. I'm  
11 not making this up, right, it depends, again, upon what?  
12 A diagnosis. So we went through great pains to show you  
13 where these illnesses came from, that the illnesses in  
14 all six of these patients was -- were -- was real.

15 And then when the issue came up, he said,  
16 oh, well you can't trust all the nurses. Even though  
17 they all came up here and they all said, well, somebody  
18 was doing it, but not me.

19 Did you notice that?

20 Everybody was critical, judgmental, another  
21 thing that's happening in this world. People are so  
22 judgmental about everybody else, but -- but not me.  
23 What I did was right.

24 And that was the truth for Escamilla, oh,  
25 no, Dr. Escamilla's the same way. Oh, everybody else

1 but not me, I did right.

2 All right. And it's important because first  
3 you have this diagnosis and that's what the opinion is  
4 based on. If the diagnosis is factual, there's a basis  
5 for it, right? That's where -- that's where if there's  
6 going to be fraud it's got to come in. But there isn't  
7 any here. And we showed those diagnoses came not from  
8 anybody employed by Merida, but from other doctors, from  
9 the Baptist Health Systems, right, from Dr. Arizaca,  
10 from doctors from the -- from the -- from the Gonzaba  
11 Medical Group, right? And we're going to go through  
12 that in -- in detail.

13 So when you have just a mere difference of  
14 opinion, a crime, ladies and gentlemen, cannot be based  
15 on somebody getting up there and saying, I disagree with  
16 that nurse, I disagree with that doctor. That doesn't  
17 establish fraud, that establishes a disagreement.

18 Because this prediction of the future, I  
19 mean, honestly we get two weathermen who give two  
20 predictions about the future and one's right and -- and  
21 the weather turns out one way and doesn't turn -- I  
22 mean, one's a fraud?

23 No, that's common sense. We know that.

24 So let's turn to the first witness that we  
25 talked about here in terms of defining -- defining



1 hospice, Laurie McMillan. She said, prognosis of life  
2 expectancy is not an exact science.

3 Was that Laurie McMillan's expert opinion?  
4 No, it wasn't. I knew the answer to the question when I  
5 asked it. She had to say yes. You know why? Because  
6 it's not just her saying it, she didn't make that up.  
7 Right? It comes from the Government's Exhibit A-30. It  
8 comes from the Medicare manuals, right?

9 Right here from the Medicare manuals it  
10 says, right there, predicting of life expectancy is not  
11 always an exact science. The fact that beneficiary  
12 lives longer than expected in itself is not cause to  
13 terminate benefits.

14 These are hard concrete facts. One of my  
15 favorite, you know, legal idols is President --  
16 Secretary John Adams. John Adams famously said facts  
17 are stubborn things. This is a very stubborn fact.  
18 Neither one of us gets an opportunity to debate this  
19 fact, but it says right there, it's not an exact  
20 science.

21 What's going on here, what is CMS, what is  
22 Medicare trying to say? They're saying there's room for  
23 disagreement about this prognosis because the  
24 certification, ladies and gentlemen, the certification  
25 that the doctors give is, I certify that the patient has

1 a life expectancy of less than six months if, if,  
2 conditional, if it runs -- the disease runs its normal  
3 course.

4 So nothing happens, we don't treat this  
5 person, we don't do anything, what's going to happen?  
6 It's a prediction. But to even emphasize the point  
7 more, CMS says, the fact a beneficiary lives longer than  
8 expected, expected than what, six months, is not cause  
9 to terminate the benefits.

10 They understand that these things are going  
11 to happen. They forget to tell you, you know, they --  
12 they look at it, you know what, at first glance, when I  
13 first started learning about hospice and getting into  
14 this, hey, the length of stay is that really -- that's a  
15 good point. We've known it for years.

16 But what have we learned? What have we  
17 learned when we talk to doctors and nurses? That there  
18 are -- there are diseases that kill you quick and fast,  
19 right? You can have a heart -- a heart attack, a  
20 stroke, right, lung cancer, pancreatic cancer kills you  
21 quick, faster than six months.

22 There are other diseases out there that are  
23 slow. Remember I talked to somebody up here, I can't  
24 remember the witness's name, cruel, cruel, slow death.  
25 Deaths by a thousand cuts.

1                   Hospices who have a high number of  
2   Alzheimer's patients, therefore, are going to have  
3   longer lengths of stay, right, versus a hospice that  
4   specializes and really goes out and says and -- and --  
5   and markets to cancer doctors, to the oncologists. It's  
6   legal to do by the way. We heard it from everybody up  
7   here, marketing is legal. You can go and advertise the  
8   services of hospice, right? Doctors can advertise,  
9   lawyers can advertise, businesses can advertise, they  
10   can say, hey, here's a service that we provide.

11                   And if you market to a cancer, an  
12   oncologist, and you're getting all these fast killing  
13   diseases, well, how is that going to affect the data on  
14   the length of stay? You're going to have a shorter  
15   length of stay in your patient population because all  
16   your patients have diseases that kill you quick.

17                   Or if you're getting patients from managed  
18   care, the elderly, the Gonzaba Medical Group, those  
19   patients are going to have slow disease processes. So  
20   how is that going to affect your numbers? Right?

21                   Instead, you know what, they had a  
22   statistician who could have done all that stuff. It's  
23   called self stratification, right, where you make sure  
24   you've got for granted that you got people from each  
25   different location, from different -- they have the

1 right disease mixture, you know, all these sort of  
2 things.

3           They're not telling you that. They just  
4 want you to go all over and -- and be impressed by these  
5 numbers and be impressed by the fact that somebody lived  
6 longer than an initial 180 -- the initial 180 days.

7           Don't fall for it.

8           It's more complicated than that. This is  
9 not simple stuff. Each case is difficult. Each case  
10 has details. You just can't come in here and say it,  
11 it's not enough.

12           Again, Laurie McMillan unlimited. This is  
13 the idea that the certification process can continue.  
14 It's built into the system.

15           Hit the next slide, Roy.

16           All right. Hit it again, Roy.

17           Again, the holistic approach. What's the  
18 point? Why do I keep harping on this? This is why it's  
19 important. Again, because it fits into what is defining  
20 what hospice is because you need to know what hospice is  
21 in order to judge whether a fraud has been committed  
22 here, right? And it's a holistic approach. It's not a  
23 checkbox formula. You've got look at the individual  
24 patient. The doctor has to look at the -- at the  
25 circumstances of each of these patients. It's an

1 individualized approach, which is exactly the opposite  
2 and specific, which is exactly the opposite of what the  
3 Government has spent our last two weeks trying to do  
4 here and just paint with a broad stroke.

5 That's not what hospice is. That's not how  
6 it's to be evaluated. You look at the diagnosis of the  
7 terminal condition and it says, at least, right? In --  
8 in reaching a decision to certify the patient is  
9 terminally ill the hospice medical director must  
10 consider at least the following.

11 Remember, I asked Ms. McMillan at least,  
12 this is not the whole list, at least this. Look at the  
13 whole approach. All right. So now, again, McMillan  
14 another very important concept, we're -- I'm laying the  
15 foundation here. I took the time to do this and I'm  
16 taking it again to lay the foundation for, again, what  
17 hospice is because it's very important here because --  
18 that the primary care provider is allowed to also serve  
19 as the medical director, right? And that the hospice  
20 has to have a medical director because this -- this  
21 relates to an understanding why the Government hasn't  
22 met its burden on kickbacks. Right?

23 They want to say that because -- that  
24 Dr. Virlar, right, was the -- was the primary care  
25 provider and also the medical director that when we paid

1 him for the medical director services, those checks and  
2 that agreement we have, oh, it's not worth the paper  
3 it's written on.

4           It is. Why? Because it's mandated by law.  
5 And guess what, we were following the law, we were  
6 complying. How -- I'll tell you folks, those types of  
7 contracts, having those contracts, complying with the  
8 law, you heard testimony about that we had quality  
9 assurance people, we spent hundreds of thousands of  
10 dollars on software, all of that behavior is 100 percent  
11 inconsistent with the intent to cheat, to defraud. It's  
12 opposite.

13           If you are trying to cheat and defraud,  
14 you're not going to go out and spend money on  
15 compliance, right? You're not going to hire a lawyer to  
16 submit your -- your applications to CMS. And they are.  
17 You can check them out in the A series, that was  
18 application that we signed they were submitted by a  
19 lawyer. That is completely inconsistent with the state  
20 of mind the Government wants you to believe my client  
21 had.

22           Got to have a medical director. They can --  
23 they can be the same person. And so McMillan who after  
24 we -- she says, okay, you know what those  
25 certifications, paying for those CTIs, the certification

1 is not kickback. For their role as a medical director,  
2 the role includes those certifications of terminal  
3 illness. Again, very important. We're going to get  
4 into more detail about the -- the kickback side.

5 But there is a safe harbor, exception,  
6 right, when you're paying for professional services. It  
7 was real clumsy at times, but I would ask a lot of these  
8 witnesses who were getting paid by the Government if  
9 they were being paid for their time and for their  
10 testimony, right?

11 Why? What was that question about? Well,  
12 that question was about is to say that, you know what,  
13 they're -- they're not being paid for their -- their  
14 testimony isn't bought. Right? Money's being paid, but  
15 how do you characterize it? It's in the eye of the  
16 beholder. The witness is always going to say, no, no,  
17 no, you haven't bought my testimony, right, what you've  
18 bought is my time.

19 It's the same thing here. It's the same  
20 thing here, where they're not paying for the referral,  
21 they're paying for the professional services and for the  
22 certification, for the -- for the IDG meetings, for the  
23 role of what a medical director does.

24 And she says that's not a kickback, right  
25 there. She -- she then -- she then goes -- she then

1 says there at the very bottom, she doesn't know what the  
2 market value is. And that's important because, again,  
3 Ms. McMillan didn't come in here and provide any  
4 specifics. She just came to give generalities. She  
5 didn't have any specifics about a single patient, a  
6 single doctor, a single certification. She was here to  
7 educate about the hospice program, right, and she did  
8 that -- she did that here.

9 She goes on to say, all right, because we  
10 got face-to-faces, you'll see in a little bit the checks  
11 that the Government put up in front of you, those nice  
12 slides that cost us \$6,500 a piece from our \$250,000  
13 expert, he made this nice little chart for the  
14 Government, right, those were all face-to-face payments.  
15 You'll see the memo line.

16 And she says, face-to-face, put another way  
17 is a legitimate professional service that a doctor can  
18 expect to be paid for was my question.

19 She said yes.

20 Is it a kickback? No. Payments for  
21 face-to-faces are not kickbacks.

22 Couldn't be anymore clear than the  
23 Government's own expert.

24 Here you go, here's the example. That  
25 check, the second check, the first check was -- this is



1 the check to Dr. Virlar, F2F, face-to-face services,  
2 that's what they allege. McMillan says it's not a  
3 kickback.

4 Here's another check. This is the check to  
5 Dr. Carrillo for face-to-faces, McMillan says that's not  
6 a kickback.

7 You apply her testimony, again, and this is  
8 Dr. Pena, there's another one for face-to-face service  
9 medical professional services; that's not a kickback.

10 Not because I said it, their lawyer -- their  
11 expert said it. And then she had -- didn't know  
12 anything about Rodney's intent. She can't help us at  
13 all. The Government has to prove beyond a reasonable  
14 doubt that Rodney willfully, and the Court has given you  
15 Instructions on willfully, intentionally knew that he  
16 was crossing the line and did it anyway. She doesn't  
17 have any information about that.

18 So I want to step back a little bit here and  
19 go over some of the key sections of the Court's charge.  
20 It was read to you, you'll have it here in front of you,  
21 but you're going to get it, but this comes straight out  
22 of charge, all right.

23 So here are, and, again, this is all kind of  
24 set up for the -- the evidence that we're going to get  
25 to in more detail here.

1           We're always presumed innocent. The law  
2 does not require us to prove our innocence and the  
3 Government is required to prove reasonable doubt. If  
4 the Government fails to establish that, you must, it's  
5 not may, or maybe, must find the Defendant not guilty.

6           What's reasonable doubt mean? The Court  
7 defines it. Reasonable doubt, according to the Court  
8 says -- is -- is proof so persuading that you would be  
9 willing to rely and act on it without hesitation in  
10 making the most important decision of your own affairs.

11           Reasonable doubt. Hesitation, pause, that's  
12 it. That's enough. If Virlar doesn't give you pause,  
13 nothing will. Virlar is -- is an icon of reasonable  
14 doubt. Nothing -- he is not a truth-teller, nothing  
15 that he says comes without some reasonable doubt.

16           Our right to remain silent. Everybody knows  
17 this. You can't hold that against us. But as a -- as  
18 I've said earlier, there is evidence in the case, we  
19 have Defense Exhibits, you're going to get our Defense  
20 Exhibits, they're in there, some of them were alluded to  
21 and we showed the medical agreements. They're here.  
22 The Defense does have evidence.

23           What's proper evidence? I already kind of  
24 touched on this, documents, exhibits. I'll submit to  
25 you that there has been testimony from Dr. Gonzaba,

1     there has been testimony from Dr. Posada, there has been  
2     testimony from Dr. Pelly, there has been testimony from  
3     Dr. Zertuche, there has been testimony from Dr. Chandra  
4     Hassan, there has been testimony from dozens of doctors  
5     and dozens of nurses.

6             You know why? Because testimony, evidence  
7     is not just that comes from the stand, it comes from the  
8     records, comes from the documents. And if these  
9     documents weren't so -- if they were so unreliable, why  
10    did the Government put them in evidence? They're the  
11    Government's Exhibits. They put them in, not us. They  
12    all say Government Exhibits. You'll find them in the E  
13    series and the D series exhibits. They're there.

14            Thousands of pages. And you know what,  
15    those thousands of pages are only of these six. If we  
16    brought in the nine thousand, you know, nine hundred and  
17    thirty-three patients, we'd fill up this room.

18            So -- so we have here direct and  
19    circumstantial evidence and the credibility of  
20    witnesses. It says, in other words, your job is to  
21    think about the testimony of each witness you heard and  
22    decide how much you believe each witness. That's why  
23    it's so important, this is so important here, is it's  
24    not just what they say, but how they say it. And I  
25    think when you think back, we go through some of these

1 witnesses, what they -- how they said what they said  
2 completely undermines their -- their -- their  
3 credibility.

4           Somebody can deny not being angry at  
5 somebody. Does that make it so? No. You've got to  
6 look at their face, you've got to look at the  
7 circumstances.

8           Do they have an agenda or not? Right? Do  
9 they have something to gain or not? And I submit to you  
10 that over and over, the Government put up witnesses,  
11 didn't tell you a thing, didn't tell you a thing about  
12 the -- what -- what skeletons they had in their closet  
13 until we got up, and either I, or co-counsel, or the  
14 co-Defendant's counselor came up and brought things up.  
15 Over and over and over.

16           You're only to consider the crime of -- the  
17 crime charged. We're not on trial for any act, conduct  
18 or offense not alleged in the indictment. This isn't a  
19 popularity contest. This isn't who's the best -- who's  
20 the best boss, who's the nicest guy, who's the meanest  
21 guy. No, this is about a willful intent to commit  
22 fraud. That's it. Not about what kind of car you  
23 drive, anything -- they -- they'd like to color --  
24 they'd like for you to -- to color the way you look at  
25 my client based on that, to infer some sort of

1 wrongdoing. Resist that. You know why? Not only  
2 because it's wrong, but because the Court says so and  
3 the Court's Instructions say not to.

4 Medicare regulations. I talked about CFRs,  
5 we got into all these details, right? A violation of  
6 civil Medicare regulation, if such violation occurred,  
7 is not alone a criminal offense. If you don't die,  
8 the -- the regulatory I's are crossed, the regulatory  
9 rule T doesn't make you a criminal, that is common  
10 sense, all right?

11 This doesn't mean if you check a box wrong,  
12 or somebody did one thing is out of place that -- that  
13 that amounts to a violation -- you didn't follow some  
14 rule but that that means it's a crime or a fraud has  
15 occurred.

16 This is not a civil case, right? You recall  
17 Ms. McMillan went over that. Mr. Guerra did an  
18 excellent, excellent job in distinguishing the  
19 differences between civil proceedings and criminal  
20 proceedings and the options that are available in terms  
21 of that.

22 This is a criminal proceeding not a civil  
23 proceeding.

24 Count One. Count One is the count on -- on  
25 conspiracy. And you have -- and you see here at the

1 bottom that -- that there's some agreement that's to be  
2 made.

3 I submit to you Count One, and that the  
4 Government's theory in this case is control and -- and  
5 dependent on the specific. Count One is the general.  
6 And this is what they want. This is how they've  
7 orchestrated, this is how they put it together. They  
8 want the general to go first. They want you to buy into  
9 it and oh, just paint with a broad brush and everything  
10 else behind it goes. Once one domino falls the rest go.

11 This case is about Counts Two to Seven. The  
12 specific, these particular patients, those particular  
13 dates. And look at it when you go back into the jury  
14 room look at the description of the services. Not a  
15 single one of them has got home health care. They're  
16 all hospice. There are specific dates here. They have  
17 to prove those specific facts, not some other date, not  
18 some other periods, those.

19 Here's the definition of knowingly, the  
20 definition of willfully. Purposefully with the specific  
21 intent to do something the law forbids. You got to do  
22 what you're doing is wrong. There's no evidence of  
23 that. Rodney Mesquias didn't sign a single  
24 certification to put people into hospice for Counts Two  
25 to Seven.

1                   So let's get into it. Let's get into it.  
2     These are all facts in the case, Jack High, he's 76.  
3     The diagnosis, severe Alzheimer's debility. The  
4     certification came from Dr. Gonzaba. The history  
5     provided by nurses who aren't charged here, who saw  
6     that -- remember the watermelon? This man -- this  
7     man -- this man's Alzheimer's was so severe that he  
8     didn't know the difference between a chair and a  
9     watermelon. Sundowning and escapes.

10                  And -- and, again, maybe this is just  
11     confusion on -- on -- on the Government's part, or maybe  
12     worse, I don't know, but the fact that you're not  
13     homebound, there's plenty of testimony in here, the fact  
14     that he can escape bears nothing on your eligibility for  
15     hospice.

16                  It would for home health, right, if you  
17     could run -- if you can leave, if you can escape, well,  
18     by definition, by a fact, you're not homebound. That's  
19     the problem. But that's not what hospice is about.  
20     That's the example we ask the questions about the Make a  
21     Wish kids, we know all that.

22                  I saw the other night, for those sports fans  
23     here, you know, Jimmy Lee he made his great speech,  
24     don't ever give up. He's in a tuxedo, he died two  
25     months after he gave that great speech. Right? But he

1 was at an event with tuxedo moving around, telling  
2 stories, laughing, crying, if the Macarena had been  
3 around there, he might have done that, too. That  
4 doesn't mean he wasn't terminal. These are two  
5 different concepts.

6 Jack High's wife Gloria, she was  
7 overwhelmed, they put her -- she asked for respite care  
8 to give her a break. When they sent her husband Jack to  
9 the nursing home for four or five days because he was so  
10 hard to handle. He wished he was dead. Functional  
11 declining, dependence. He's totally dependent. All  
12 those are the diagnosis. That's the holistic approach  
13 of what we're looking at here.

14 So when we look at stuff, so when we look at  
15 Jack High in this particular count, we've got to pay  
16 attention to August the 14th of '13, right? And so  
17 here's the certification for that period.

18 And they told you, Jose Virlar signed it.  
19 Maybe it's just an accident, maybe not. But he didn't.  
20 Gonzaba signed it. There's the certification for that  
21 particular period. Right there, folks, you can't meet  
22 your burden.

23 Dr. Gonzaba testified in this case right  
24 here in this document that's his certification. Does  
25 Virlar agree? No. Why? Well, we know he's got plenty



1 of reasons, right, to come in and say differently.  
2 Because there's a second jury here, remember, remember I  
3 told you that, opening statement? You're not the only  
4 jury here.

5 This table, all those agents out there, this  
6 whole side over here, all those agents, they're judging,  
7 too. They're judging, and you know what, and he knows  
8 that, he knew that up there.

9 There's a certification by Gonzaba. And how  
10 did he get there? Remember the August the 13th date,  
11 was it by the hand of Virilar? No. It was by Greg  
12 Gonzaba. He told him. It was his opinion, it was  
13 Gonzaba's professional judgment, clinical judgment.

14 To evaluate entry. Again, here is. He's  
15 the one. Look, he says here to evaluate and treat,  
16 release all care to the hospice medical director.

17 Who was that? Him.

18 Is that okay? Yes, it is.

19 We know that from -- we know that from  
20 McMillan, we know that -- remember that concept I kept  
21 bringing up, continuity of care, right, where doctors  
22 want to -- patients want to keep their -- their doctors  
23 and -- and doctors want to keep their patients, so they  
24 refer them to a hospice in which they have -- where  
25 their medical directors. Just like doctors admit

1 patients to hospitals at which they have privileges so  
2 they can continue to care for the -- for those people.  
3 There's nothing, you know, sinister about this, this is  
4 just how it works. Good medicine. It's legal.

5 This is his -- this is Dr. Virlar's notes  
6 on -- on -- on Mr. High. There's his signature.

7 So Two is gone, Ms. Gonzaba.

8 Count Three. Francisca Perez, 88 years old.  
9 88 years old. Chronic respiratory failure. We'll show  
10 you where that comes from. Certified by Dr. Pena. This  
11 woman had a history of -- she had a stroke, she's 88,  
12 stroke, dementia, respiratory failure, she was bedbound,  
13 she -- she had a feeding tube, a peg tube.

14 Go through the records and -- and they're  
15 not just his records, they're records from all over.

16 The chaplain. I don't think the Government  
17 is saying the chaplain is a liar, the chaplain said he  
18 spoke with the family members and told them to start  
19 making funeral arrangements. This was a holistic  
20 approach, the doctors have to take a holistic approach  
21 and I would submit to you, you should too.

22 Edgar Jimenez, this is the chaplain, right?  
23 This is on December the 18th. If you look at the bottom  
24 there, that's the -- that's the start of the  
25 certification period. What does he say? She's a

1 bedbound patient.

2           So I don't know. Maybe that counts now.  
3 With Jack High they seem to think bedbound, I still  
4 submit to you its -- it gets into the hospice side in  
5 terms of the holistic approach, right, but when they  
6 talk about Jack High, the fact that he's not bedbound is  
7 supposed to be important.

8           When it comes to Francisca Perez's ailments,  
9 now all of a sudden that's a fact we're going to let it  
10 go. But she's bedbound, she had a stroke. She's  
11 active, but what, slowly declining. She's not suffering  
12 from one of these fast killing diseases.

13           We spoke about the DNR, do not resuscitate.  
14 Right? And how important it was to respect his mom's  
15 wishes. The chaplain is talking to the son. This isn't  
16 made up, this is real. Dr. Virlar didn't type this out,  
17 not all these records, you know, I mean, they -- they  
18 want to just kind of splash this idea that -- that  
19 Virlar poisons everything and just throw the baby out  
20 with the bath water. You're smarter than that.

21           We've gone through the details here. That's  
22 not the case. There's nothing unreliable about this  
23 document. This is what she was at that time. And this  
24 is part of the basis for the certification, right?

25           And it wasn't just the chaplain, you've got

1 a nurse, Eduardo Ramos, who certified her on the same  
2 day. Because you have multiple disciplines coming to  
3 see her. It wasn't just one person, right? You've got  
4 the chaplain coming on the 18th, you've got the nurse  
5 coming they're and all evaluating her, what, so they can  
6 go to the IDG meeting where they all come together.

7 And I've showed you these over and over  
8 where everybody signs off, the nurse, the chaplain, the  
9 social worker, they all sign and those happen every two  
10 weeks as they're supposed to. Again, an indication of  
11 the state of mind of Merida, of compliance. If they're  
12 trying to rip people off, why go through all of that,  
13 why pay all these people? It doesn't make sense, it  
14 doesn't fit.

15 The hospice nurse conducted a multi-body  
16 recertification assessment. She's unable to verbalize  
17 simple needs. Unable to carry an intelligible  
18 conversation due to confusion, an Alzheimer's patient  
19 continues to be fully dependent on all ADLs, assisted  
20 daily living activity. She has a peg tube, she can't  
21 feed herself, she can't clean herself, she can't do  
22 these.

23 Is it unreasonable for a doctor to come in  
24 and say, you know what, I think given the fact that  
25 you're 88 and you have all these things going on in your

1 life, you know, that you're going to die within six  
2 months? Yes.

3 Is it reasonable that another doctor could  
4 come in there and be much more optimistic and have a  
5 different perspective and say no? Yes.

6 Can they both be right? I submit to you  
7 they are because it's an opinion. But what the facts  
8 are undisputed about that Francisca Perez was a real  
9 patient, who received -- who qualified for Medicare, who  
10 actually -- who -- and services were rendered and  
11 provided, right, and that she had these things. That's  
12 not in dispute.

13 This isn't where, like Dr. Carrillo went  
14 over there and billed for fake patients, patients were  
15 dead, that's fraud. Right? That's fraud. These  
16 patients are real. And the services they received and  
17 the conditions they were suffering from were real.

18 Here's the IDG meeting, all right, on  
19 Francisca Perez, for that same certification period and  
20 they say she's got chronic respiratory failure. And  
21 here are the signatures. Everybody went.

22 Erica Pena, registered nurse, Jackeline  
23 Bassini was the social worker, Edgar Jimenez was the  
24 counselor, and Dr. Pena was the doctor. They all met,  
25 they all signed off.

1           Again, more. Francisca Perez, 03/10 within  
2     the certification period at issue with her, within  
3     Count Three. The patient is disoriented times three.  
4     That means person, place, everything's gone. Totally  
5     bedbound, depends totally on staff for all assistance  
6     and personal care.

7           We talked about, and you heard about how  
8     comorbidities, it's not just the primary diagnosis, it's  
9     all the secondary diagnoses, too, all the things that  
10    are going on. It says here that, again, the peg tube,  
11    limited ROM, range of motion, to upper and lower  
12    extremities with contractors to hands with right hand  
13    closed. This is the effect of a stroke, she can't move.  
14    Limited range of motion, she's got her hand like this.  
15    All of those things, the ability to feed yourself,  
16    clothe yourself, all of that effects the person's  
17    ability to stay healthy, to stay alive, to thrive,  
18    right?

19           That's a patient you look at them, and you  
20    know what I'd say she fits the description of that -- of  
21    probably that classic conception of what hospice looks  
22    like. Somebody lying on their bed completely  
23    incapacitated, that looks like death. Well, it's not  
24    limited to that. It could be death and also be where  
25    you're mobile.

1           It's complicated, right? It's not black and  
2     white, it's gray. The world is complicated.

3           Teresa Calvillo. This is a really  
4     interesting one. She's 79 years old, COPD, chronic  
5     obstruction pulmonary disease. Severe chronic lung  
6     disease, HDH, hypertension, they're are all the  
7     diagnoses she had. You can have more than one, folks.  
8     The PCP was in the Gonzaba Medical Group, Dr. Arizaca.

9           How did Teresa Calvillo end up over there in  
10    hospice with Merida? Was it through the -- the hand of  
11    Dr. Virlar? No, it was Dr. Arizaca. The Government  
12    hasn't charged, the Government hasn't given a plea deal,  
13    the Government hasn't (unintelligible).

14           You see some of the details there about her  
15    PPS score, 40 percent, functional decline, her history,  
16    tachycardia, she's got her heart rate going fast,  
17    dyspnea, shortness of breath on a minimal assertion, and  
18    she was receiving oxygen treatment.

19           That's another thing you've got to remember,  
20    too. In these medical records, these patients are being  
21    treated for their symptoms within hospice. You go to  
22    hospice, you're not going to get any care to cure  
23    disease, but Alzheimer's and these -- these  
24    (unintelligible) and these COPD's, they're not curable.  
25    It's not like a cancer where in theory you could get

1 chemo, you could get surgery to cure some things, and  
2 the cure rates are low, or you give up those  
3 opportunities to be cured.

4           These diseases don't have cures. But you --  
5 within hospice you're able to treat the symptoms because  
6 hospice is about palliative care, it's about comforting.  
7 So if you're short of breath, guess what, you can get  
8 oxygen. And guess what, when you get oxygen, you're not  
9 short of breath anymore. Your oxygen levels go up. So  
10 when you're being treated, you know, you got a headache,  
11 you get Aspirin, the headache goes away.

12           So when a patient, when they come to visit  
13 you they're taking an assessment of what you have. But  
14 you're also, those symptoms, are being mitigated or  
15 being depressed by the treatments that you're receiving.  
16 That explains why some of these treatments, when doctors  
17 and these nurses make these visits, they go up and down  
18 because they're getting treatment for the symptoms --  
19 they're getting treated for the symptoms. That's the  
20 point.

21           So, again, here is the certification period.  
22 November the 6th, that they have brought up, right?

23           But prior to that, how did she get here?  
24 This is the second certification period, the second 90  
25 days, the second half of the first six months. How did



1 she get here in the first place? Was it through Virlar  
2 or Calvillo? No, it was right here by Dr. Arizaca,  
3 wrote the script.

4 And I don't -- I can't remember the  
5 different -- some of these witnesses up there. Do you  
6 remember that one witness when I zoomed on in Rx up  
7 there, and he fought and fought about I don't know what  
8 Rx is, he's a nurse, a prescription, he put a  
9 prescription pad. You've got to ask yourself, I got to  
10 bring this up at this point, you've got to ask yourself  
11 what's going on there? Why were these witnesses, why  
12 were these Government's witnesses who are scripted, who  
13 met with the Government several times, why won't they  
14 give on something simple and basic like that when we ask  
15 them questions? What's going on? Is there an agenda  
16 going on? Are they trying to please somebody? Are they  
17 really just being neutral fact witnesses coming in here  
18 to tell us what's going on, or do they have a little --  
19 some agenda going on?

20 I submit to you there was example after  
21 example after example after example of that and when I  
22 saw that Rx that's what made me think.

23 And she didn't just say, you know, to  
24 evaluate Dr. Arizaca, she said to admit. That's  
25 testimony, that's evidence right there uncontroverted by

1 the Government that Patricia Arizaca on 08/05/13  
2 believed, had a clinical judgment that Teresa Calvillo  
3 was terminal. The fact that they want to bring in a,  
4 you know, Dr. Virlar, or somebody else to say different,  
5 that's their prerogative, but it doesn't change that  
6 evidence.

7 And there's no evidence, there's nothing to  
8 undermine Dr. Arizaca. All right. But she's not alone.  
9 Antonio Guerrero, an RN, same thing. Did an initial  
10 evaluation, right, and -- and you'll see here the  
11 evaluation is consistent with the admissions, right? It  
12 talks about she had a colostomy bag. She used a walker,  
13 had unsteady gait, she had, oh, the recent fracture to  
14 the right hip. I think this was the patient, remember  
15 it was somebody would -- wouldn't -- wouldn't agree  
16 about, you know, the -- whether she had two fractures or  
17 not?

18 So the initial certification to get into  
19 hospice, again, is done here by Dr. Gonzaba. And that's  
20 very, very important here because when he does this, he  
21 does this, he's certifying for a six-month period. And  
22 Count Four is the second six months, months three  
23 through six.

24 Dr. Gonzaba's certification and opinion is  
25 what Count Four is all about. Gonzaba just didn't

1 disappear though when it comes to the second 90 days.  
2 He signed, as you might expect, he signed on 11/15,  
3 which is now in the -- in the specific count period, he  
4 signed the plan of care. He was the medical director.  
5 There's his signature right there.

6 He's taking care of this patient. He's  
7 saying she's terminal, his opinion, he's exercising his  
8 clinical judgment. By the way, Dr. Arizaca works for  
9 Dr. Gonzaba, she is a physician within the Gonzaba  
10 Medical Group.

11 Same thing here. Another example,  
12 additional, Gonzaba stays with her care. He doesn't  
13 just do it once, he continues to do it. Again as the  
14 medical director, and you see here, the first one is  
15 there on 12/13 and the next one is on 12/27, that's  
16 fourteen days later. That's exactly according to the  
17 regulations. Every fourteen days have you to have IDG  
18 meetings where everybody, all the disciplines of the  
19 hospice, are getting together and they're discussing the  
20 patient and they're all -- and they're all signing --  
21 signing off on it. Again, that's what he's doing.

22 Count Five, Castaneda. 79 years old. This  
23 is the one with Dr. Tom Gonzaba. This is probably the  
24 most egregious example of -- of the Government failing  
25 to meet their burden. This -- this -- Mr. Castaneda had

1 a prior stroke. His wife in the records, if you go  
2 through the records, this poor man, his wife died the  
3 week that he went into hospice. We all know how -- how  
4 the death of loved ones affects us emotionally,  
5 spiritually, it affects our ability to fight diseases,  
6 it adds stress. That is -- that's part of the holistic  
7 approach you have to look at here in this case of why  
8 now? Why -- why Mr. Castaneda went into hospice now?  
9 What you're going to see when we go through the  
10 timeline, about two or three months before Gonzaba wrote  
11 all those notes, Instructions to leading up to time and  
12 saying, I need to go to hospice, I recommend you go to  
13 hospice.

14 He didn't go right away, but as soon as his  
15 wife dies, he goes. That's the holistic approach. He  
16 had the end of life discussions. And -- and these  
17 documents we marked, I admitted as a separate exhibit, I  
18 think it's Defense Mesquias Exhibit either 100 or 101,  
19 we put these series of medical records together, but it  
20 shows the progression in leading up of how Mr. Castaneda  
21 got into hospice on October the 16th of '13, he --  
22 Dr. Tom Gonzaba, this is different, he is the brother,  
23 Greg or Greg/Vincent Gonzaba is the other Gonzaba that  
24 we've -- I've shown you all these records on, there's  
25 two.

1           Tells him to consider hospice service.  
2   You're in progressive decline. A couple of months later  
3   he comes back in again, remember he tells them,  
4   explains, hey, if you've got an emergency, go to the  
5   hospital, here's our deal, but be sure and go to the  
6   Baptist Health System where we have people so we can  
7   communicate. Continuity of care.

8           A few months later to January, all of a  
9   sudden Dr. Gonzaba does the assessment, chest pain,  
10   heart damage, CHF, he seems short of breath, discussing  
11   things, and he tells him, the same day at the end he  
12   tells him, I anticipate your symptoms will worsen over  
13   the next six to 12 months. He ends up telling him, it's  
14   recommended that due to your decline, review your  
15   advanced directives with both your family and me. Get  
16   your affairs in order. He's telling him.

17           A couple of months later, he has that end of  
18   life discussion, you probably remember the -- it's a  
19   big -- it's right there on the page big bolded area end  
20   of life discussion, yes or no, check yes. They had it.  
21   And he tells him on that same day that he recommends due  
22   to his decline in health and progression of your  
23   disease, I recommend you go to hospice services.

24           And you know what he's doing and then he  
25   markets hospice because you know what who wants to go to

1 hospice? Oh, me, me, me. No. No. Nobody wants to  
2 send their loved one to hospice. This is not -- this is  
3 not, you know, a happy thing. This is a scary thing.

4 So what have you got to do? You encourage  
5 people, you -- you show them the upside of the program.  
6 And you know what, it's not going to cost them any money  
7 out-of-pocket. There's nothing wrong with that, you can  
8 market it.

9 Now, somehow in the Government's view of  
10 things, that is a sinister thing to do. That somehow  
11 telling people, hey, you get benefits that we're taking  
12 advantage of them. I couldn't disagree more. I think  
13 that is a distortion, right, a complete distortion of  
14 what hospice is really about. And it ignores the  
15 reality on the ground, folks, of that -- that doctors  
16 and patients don't want to be on hospice, right?

17 And that there's a huge underutilization,  
18 one of the witness experts brought that out,  
19 underutilization of hospice. What does that mean?  
20 People aren't using it enough, that's why the Government  
21 allows people to market about what it is and explain the  
22 benefits of it.

23 And you know what, what some of the benefits  
24 are to it? That you not only get your medications, but  
25 you know what you get what we call DME, right, you get

1 medical equipment, all right? You get a wheelchair.  
2 You get a hospital bed. You get these things. Those  
3 aren't kickbacks, those are services that are part of  
4 the -- a part -- a part of the care.

5 And -- and so Dr. Tom Gonzaba isn't doing  
6 anything wrong here. He's educating and encouraging his  
7 clients to -- his patient to do something that he  
8 believes in. And you see here, all right, so that's  
9 February 28th, right, in June the 3rd, he's making --  
10 March, June, so you've got two months there, boom, he  
11 goes in. And what happens? His wife dies in that  
12 period. That's the straw -- that's the last straw that  
13 broke that camel's back, put him into hospice.

14 Count Six. Petra Cerda. 89 years old,  
15 dementia, Alzheimer's, certified by Dr. Pelly, and  
16 Dr. -- and Gerardo Reyna, an RN, face-to-face was  
17 conducted by Sid Fernald, another nurse. She had a  
18 history of COPD, she was incontinent, she had heart  
19 disease. Oh, yes, Dr. Gonzalez.

20 And Dr. Gonzalez is referring her over. I  
21 misspoke, he -- I'm sure it wasn't intentional. He  
22 misspoke in his argument to you. Dr. Gonzalez had no  
23 idea, I guess he forgot that Dr. Gonzalez was the one  
24 who -- who sent the order to Merida. We'll see that in  
25 a second, and you'll see the -- the -- and Dr. Gonzalez

1 also documents her decline as sharp significant decline.  
2 We'll go through that timeline in a second here.

3 She's unable to care for herself, she's got  
4 decreasing weight, her food intake is going down. And  
5 then down here at the bottom CTI by other doctors within  
6 her hospice treatment, Dr. Shekar, Dr. Posada,  
7 Dr. Pelly, Dr. Marin, all these doctors, all these  
8 doctors certify her.

9 Now, you could choose to believe the  
10 Government's theory that everybody down here is in on  
11 it. You could be a cynic. You could believe that just  
12 based on what they say must be right because that's the  
13 only -- that's the only explanation, everybody and  
14 everything must be fraud, all these nurses, all these  
15 doctors, everybody is terrified of Rodney. It doesn't  
16 add up. It doesn't add up.

17 So here's her certification, right? And you  
18 see there is received by Reyna, 20/10, here we've got  
19 the -- this is the certification period for that. It's  
20 done by Lorenzo Pelly, see there at the bottom. There  
21 's no corroborating evidence that Lorenzo Pelly is a  
22 criminal or engaged in any kind of fraud. Unless you  
23 want to believe Dr. Virlar and his best man. And I  
24 don't even think he said anything about it. But they  
25 sure tried to just lump everybody in there.



1                   That's all they got. So here's what --  
2                   here's what Nurse Reyna says on the -- on the date, the  
3                   day of the certification period at issue. Performed an  
4                   assessment. Gives the FAST score, all the  
5                   comorbidities, the risk for falls, gives this whole  
6                   picture and then Sid Fernald, another -- another nurse  
7                   who on the ninth, two days before he did a face-to-face  
8                   evaluation of -- of Ms. Cerda. He came up. We've got  
9                   two nurses, four or six other doctors going on out there  
10                  and we got Dr. Gonzalez to establish, again, that the  
11                  diagnosis is real. This patient did have problems.

12                  We don't even have -- even if you're not  
13                  convinced, even if you don't believe about Pelly,  
14                  Fernald and Reyna and Shekar and all these other people  
15                  here, we've got Dr. Gonzalez, the Government's own  
16                  witness. Who in January and May he -- he thinks she's  
17                  great. Then all of a sudden in June he says, she's  
18                  debilitated, basically homebound.

19                  In May, on May 5th, absolutely no  
20                  complaints, feels great.

21                  June 26th, two months later, she's  
22                  homebound. That is a huge drop in a very short period  
23                  of time.

24                  And then in September, a couple of months  
25                  later, he says she's got dementia.

1           And then October, more than a month later,  
2   she not just has dementia, she's got a specific type of  
3   dementia, advanced Alzheimer's, and that she'll continue  
4   to benefit from home health services.

5           This is their guy, this isn't Virlar, these  
6   medical records aren't made up. This woman experienced  
7   a sharp decline, the very thing -- and at -- and at her  
8   age, she's 89 years old. It's not a far leap to say  
9   that when have you that sharp of decline, you've got all  
10   the things going on with her life, that somebody -- that  
11   Dr. Pelly says, hey, I think you're terminal.

12           So Dr. Gonzalez testifies that he wanted the  
13   complete file, and I went Petra Cerda, and, yes, that's  
14   correct. He goes on and talks about her and her  
15   underlying illnesses. And he explained that the -- by  
16   his order to put her on hospice, and that was his order.  
17   And here it is, right here. That's his signature. He  
18   puts in there Alzheimer's, because you know what, she  
19   had Alzheimer's and he filled out the order. And he  
20   said to evaluate and treat her.

21           And that's how she got to hospice. Not  
22   through some sinister, elaborate conspiracy by Rodney  
23   and the whole world. He -- she got to hospice because  
24   Dr. Gonzalez sent her there. Sometimes the simple  
25   explanation is the one. Not these elaborate conspiracy

1 theories, right? And here it is.

2 Count Seven, Ms. Conti. This is the one,  
3 right, so we talked about the diagnosis, where does the  
4 diagnosis come from? You remember her? This diagnosis,  
5 again, doesn't come from some grand plot and conspiracy  
6 out there, it comes from some independent doctors. All  
7 right.

8 And let's -- and let's -- let's get to that.  
9 All right. Before we get to that, also, certification,  
10 it's not Dr. Virlar, right, it's done by Gonzaba. It's  
11 Gonzaba's opinion that they have to prove.

12 And Ms. Conti there was this idea, oh, she  
13 didn't know, she was a prisoner. She backed off all  
14 that. She was upset with how she was being treated.  
15 She -- she felt like, you know, she didn't like people's  
16 bedside manner, all right? But she consented, and we  
17 showed that over and over. This idea that the doctors  
18 didn't know, or the patients didn't consent over and  
19 over with each of these nurses and -- and witnesses, we  
20 showed the consents. They're all in there.

21 And she consented, look, and she says in  
22 here that the attending physician was Dr. Montemayor,  
23 not a doctor who's involved in this -- in this  
24 conspiracy. And remember that little (unintelligible)  
25 there, I'm dizzy, I don't -- I don't want to do that, I

1 was hung over. That was, to me, one of my favorite  
2 moments of the -- in the trial.

3 Oh, yeah and then you got other doctors,  
4 Dr. Rincon. Dr. Rincon certified Joanne Conti, right?  
5 And did her plan of -- and did her plan of care. But  
6 you know what, but let's focus in on the primary care  
7 doctor, Dr. Montemayor. Where did that pulmonary  
8 fibrosis come from? It came from her, you're currently  
9 on hospice service which I feels provides you with an  
10 extra layer of care you need at this time. That's  
11 agreement.

12 But the Government only cares about doctors  
13 who disagree. They only care about doctors who fit  
14 their theory of the case. And I got -- and I got to  
15 tell you, you know what, I get emotional and I'm going  
16 to apologize right now to you all. If there's something  
17 I said or did, or the way I -- I behave, if that offends  
18 you, I apologize. Please don't take it out on my  
19 client. But I am passionate about this stuff. My  
20 client's life is on the line, and it is very upsetting  
21 to me, right, that the -- the point of all this is for  
22 the truth to come out, not to win, not to win, justice  
23 is not about the Government winning, all right.

24 And so when you've got bad facts against  
25 you, they're obligated to show those bad facts, not to

1 cover them up, not minimize them. But that's what  
2 happens, that's what happened. In my view, that's what  
3 happened here. That's how you send up witnesses over  
4 and over, over and over, and you know what, they don't  
5 turn out to be who they are. Because you're not looking  
6 for truth, you're just looking for the right words.  
7 You're just looking for them to say what you want them  
8 to say, good enough, boom, that's it, let's go. And  
9 that's not how it's supposed to work, that's not what  
10 their job is.

11 Their job is not to secure convictions,  
12 their job to present the whole truth, not halves. And  
13 so, yes, I get upset. And you know what, this should  
14 have been brought out that Montemayor was in agreement,  
15 that Dr. Gonzalez, all this stuff that we had to spend  
16 time doing, it shouldn't have to come out in cross.  
17 These are all their records, they had them right there.  
18 But you know what happened? They didn't look. They  
19 didn't look until this trial started until all this  
20 happened, you know what, and they sent Virlar back in  
21 there for four days without a note pad, without anything  
22 just look through all these and find some bad stuff.

23 Why not find some good stuff? All you want  
24 to do is win? And can't you just imagine it, you can  
25 just think Dr. Virlar really did it, there wasn't some

1 coordination going on there? Can't you just imagine  
2 they bring in all this stuff and some agent walks in  
3 there and puts the box down and they just stare at each  
4 other? How is he supposed to know what he's supposed to  
5 do? He knew. All right.

6           So pulmonary fibrosis. We didn't make that  
7 up. Dr. Virlar didn't, and Roland Aguilar didn't get  
8 together, they're ambulance business buddies, they  
9 didn't get together and make this up. They didn't make  
10 up pulmonary fibrosis, they didn't make up interstitial  
11 lung disease. That's what's on the certification,  
12 that's as real as it can get.

13           They didn't make up this Baptist Health  
14 record. They didn't -- they didn't pressure Dr. Soria  
15 to come up with a diagnosis all on his own of toxic  
16 pulmonary fibrosis, interstitial lung disease, there it  
17 is, it's right there. These are independent places.

18           And I -- and I submit to you, you know what,  
19 the -- not only -- not only could a Government -- not  
20 only can the witness lose credibility, so can they. And  
21 they should. They deserve to lose credibility here  
22 because you know what, when you get up there and you say  
23 one thing, right, and it's within your own files, in  
24 your own records, and it's different, they should lose  
25 credibility. That's what not meeting your burden is all

1 about.

2 Oh, yeah, then this guy, Ernesto Gonzalez.  
3 He lied about transferring Joanne Conti to Generations.  
4 And I submit to you the Government put him up there  
5 knowing he lied. Knowing that his testimony was going  
6 to be what it was and knowing he was a liar. Remember  
7 that? He is the one -- I asked him here, sir, he --  
8 Ernesto Gonzalez is the guy who left who was working who  
9 was multi-tasking, he was working on the side, Rodney  
10 was paying him a bunch of money, right, and he and his  
11 buddy started up -- were starting up another business,  
12 right, and he went. And this patient who they thought  
13 wouldn't qualify he went and he got her -- he got Ms.  
14 Conti to leave -- to leave hospice, to leave Merida to  
15 go over to Generations.

16 And when we confronted him with his own  
17 signature, what did he say? Oh, no. First he said no,  
18 no, I didn't have anything to do with it, I wasn't  
19 around. And then we confronted him with his own  
20 signature, he says, well, wait a second. What does he  
21 say here, well, actually that isn't my signature, it's  
22 similar, but it's not.

23 And I said, well, you've got to say that  
24 because if it is your signature, then everything you  
25 just said was a lie. And he goes, yep, you're right.

1 You're right. And here's what we were talking about to  
2 him about, here's the transfer, right, of Ms. Conti  
3 going over to Generations. This supposedly unqualified  
4 patient, Generations wants her. Generations hasn't been  
5 charged.

6 And over here on the right side of the  
7 screen, see Ms. Conti signed February the 9th and then  
8 we have this signature here. And that's Ernesto  
9 Gonzalez. So he says looks a lot like mine, but it's  
10 not because I can't admit it because if I do, then I'm a  
11 liar.

12 The prior previous page, here is his  
13 signature. There's his name. All I can think of is  
14 my -- is my -- one of my favorite movies, My Cousin  
15 Vinny, identical. They're identical. It's him. He's a  
16 liar.

17 And if that weren't enough, if that weren't  
18 enough, all right, did the Government say, oh, my God we  
19 made a mistake, did they explain it in closing? No.  
20 No. No. They just put a move on, they put up Conti,  
21 and Conti cements the lie. Conti gets up there and says  
22 that Ernesto, Mr. Gonzalez came by your home to get you  
23 to sign the paperwork for Generations. Yes, he did.  
24 Then he she is, well, I don't think we talked about  
25 February the 9th, no, no, she goes, I don't think it was



1 the same day. Ultimately she says, yes, it was the same  
2 day.

3 Now, why is this important? It's important,  
4 folks, because the -- the credibility of these  
5 witnesses, the Ernesto Gonzalezes of -- of this world  
6 and of this case, cannot be trusted. There is doubt.  
7 He got up here, what's he hiding? Why -- what's going  
8 on? There's some agenda. That is reasonable doubt. So  
9 what's going on here with Ms. Conti and these -- and  
10 these counts? And maybe there's a conspiracy, but it  
11 certainly doesn't involve my client. She requested the  
12 transfer.

13 Belinda Gonzalez, I didn't see anybody  
14 receive kickbacks.

15 Steven Dellwo, we saw his -- the nurse  
16 Dellwo, he -- she has no reason to believe he's  
17 dishonest. Here's his records, this is about Jack High.  
18 He is the one who did the watermelon, he took down that  
19 record. It's true, it happened.

20 THE COURT: Ten minutes, Mr. Canales.

21 MR. HECTOR CANALES: Thank you, Your Honor.

22 Belinda Gonzalez, she also said  
23 Dr. Escamilla he wouldn't have engaged in fraud.  
24 Dr. Escamilla, you know, he says, hey, I wouldn't have  
25 done -- I didn't do anything, I resisted. Right?

1           He didn't give up his medical judgment. He  
2   told them you would not certify hospice patients if you  
3   believed the patient was even questionable or  
4   appropriate?

5           So look what he does here. Every example on  
6   the page is a certification, R.E., that's him, all  
7   different certifications.

8           What just happened? There we go.

9           Multiple -- multiple accounts. She says --  
10   talking about others. I'm going to start speeding up  
11   here, I'm running out of time, folks, okay.

12           No way of knowing about others. She wasn't  
13   shown the medical records. Melissa Hernandez wasn't  
14   shown medical records. Amber Kelso she said everything  
15   she did was true. Oh, here again, every -- everybody  
16   else was fraudulent but what I did was good. She worked  
17   on Jack High.

18           Jose Aguilar admitted, hey, that was the  
19   cash, but he goes it didn't come from Rodney. It wasn't  
20   Rodney's cash. Admits he committed fraud.

21           Roland Aguilera. The Government put him up  
22   there to say about -- to try to create this impression  
23   about this great close relationship, supposed  
24   relationship that Rodney had with him. He was his  
25   freaking best man. They left that out. Why? They

1 either didn't know, which suggests that they're not  
2 doing their homework, or they knew and that's worse.  
3 Either way they deserve to lose the credibility and your  
4 trust.

5           Roland Aguilera tells the truth if he feels  
6 it's necessary.

7           Janina Gonzales. Neal Williams, Mesquias  
8 wasn't involved in the meeting.

9           Plea agreement, we got to get to the plea  
10 agreements, all right? The -- the Court says you should  
11 receive this testimony with great care and never convict  
12 a Defendant on the unsupported testimony of an alleged  
13 accomplice. Unsupported testimony.

14           Dr. Virlar, Dr. Carrillo, Mr. Garza, there's  
15 no support, none. It's just their -- it's just their  
16 word which isn't worth anything.

17           You've got to believe it beyond a reasonable  
18 doubt, everything that they say. You can't. And that's  
19 not because of anything I did, that's their own  
20 behavior. We got the potential, remember I went through  
21 the potential, the actual -- the actual plea agreement.

22           It's only -- he only gets the deal if they  
23 like what he says. If he -- if they say Virlar, Garza,  
24 Carrillo if they provide substantial assistance, then  
25 they get it. That's the carrot. That's why they

1 haven't sentenced them. They're holding it over their  
2 head, the full weight of the United States of the  
3 justice department is hanging over their head.

4           You think that doesn't influence them? So  
5 you know what, demand the corroborating evidence, it's  
6 not there. Just them saying so, making a conclusion  
7 saying my -- I did it, my client is the -- you know is a  
8 fraud, he did it with me, that's not enough. Got to  
9 have something to support it or it's not there.

10           Oaths. Some oath isn't going to stop  
11 Virlar, it never has, it never will. When he's got  
12 something in it for him, that's all that matters to him.

13           And you know what, how did Virlar get here  
14 in the first place? He got here because of his problems  
15 with the pain cream, right? The FBI search. He was  
16 under tremendous pressure. The FBI hits his house, he  
17 gets hit with this big malpractice claim, he's going to  
18 have to bankruptcy, and the FBI comes, what does he do?  
19 Hey, I'll say whatever I've got to say to get out of  
20 what? To get out of the allegation that he was involved  
21 with some crime with my client? No. To get out of an  
22 allegation that he was involved with the pain cream with  
23 Marco Karam. Something totally different.

24           So he comes out and now you see what his  
25 real motivation is. He's worried about himself and he

1 will say and he has said and will say anything. And you  
2 know what, con men are good at what they do. How many  
3 con men out there who aren't personable, who aren't  
4 friendly, who aren't good liars? He's had his whole  
5 life to practice at it, he's good at it. Take him for  
6 what he is, nothing more, nothing less, and that is a  
7 despicable, self-serving, self-interested liar.

8           Here's the plea agreement. We went over  
9 that. Sole judgment, sole discretion, sole right of  
10 this table, the second jury. There it is, we  
11 highlighted it during trial, here it is again. It's an  
12 exhibit, it's in the J series.

13           Two years. During all this point in time,  
14 they didn't sit him down, Dr. Virlar, to look at medical  
15 records until we were in the middle of this trial.  
16 There's something fishy about that, folks.

17           The addictive drug instruction goes directly  
18 to Dr. Carrillo. It tells you, the Court tells you be  
19 careful. Be careful about what he says. You've got to  
20 have support, you've got to have doc -- you've got to  
21 have -- it cannot be unsupported.

22           Carrillo has a history of telling lies,  
23 bills for dead patients, takes sex for payments, doesn't  
24 pay child support, and he owes federal taxes and  
25 defaults on his loans.

1           This is the guy you're going trust one of  
2 your most important decisions in your life to? That's  
3 reasonable doubt.

4           People with this type of resume, you  
5 wouldn't -- you wouldn't buy a coat from him. You can't  
6 convict somebody based on their testimony, people with  
7 this type of character. They'll do whatever they need  
8 to save their own skin, he's proved that.

9           Cooperating agreement. It's the same one.  
10 He's not a truth-teller and he admits that. He has to.  
11 If he wants you to believe that other stuff, right,  
12 every good con man is going to tell you a little bit of  
13 truth in here, right? A little bit.

14           Joe Garza. Weak, fearful. He said it  
15 himself. Plead guilty because he was afraid of losing  
16 his home, his -- his son. But when he left, we say, he  
17 said it -- he says his lawyer said it, but either way  
18 the words were said, don't worry, you didn't do anything  
19 wrong.

20           What does that tell you? It tells you he's  
21 pleading guilty not because he is, but because he's  
22 weak, he was fearful. If he was -- if he was -- he says  
23 he did it because he was afraid. If he was afraid -- if  
24 his testimony, you want to believe that testimony that  
25 he committed health care fraud because he was afraid of

1 losing his job, what would he do to avoid going to jail?

2 Do you think he'd elaborate? Do you think  
3 he'd say more than what really happened? You bet.

4 When the weight of the United States  
5 Government comes on your shoulders, it is heavy, and Joe  
6 felt it. And so you know what, he just prepared the  
7 Government's case. No specifics. 11th hour plea, the  
8 last minute, after two years.

9 Professional services agreement, safe harbor  
10 defense, very important when you look at the charge  
11 here. All right? This is where it's not a kickback,  
12 this is what McMillan was talking about. It's not a  
13 kickback if we have a contract.

14 And we only have to prove it by  
15 preponderance of the evidence, more likely than not, 51.  
16 I don't get to score a touchdown across the end line  
17 like reasonable doubt, all I've got to do is cross the  
18 50 yard line, more likely than not, tip the scales,  
19 that's it. Very low burden, different, the Court's  
20 Instructions tells you about that.

21 The term that I showed you is for one year,  
22 market rates. Here's the agreement. Here's the  
23 agreement with Merida and -- and Virlar on November the  
24 11th responsibilities to be a hospice, it's for one  
25 year, \$250 an hour. Meets all the elements that are in

1 here. They're right here. They're in our exhibits.  
2 This is why McMillan said no kickbacks because those  
3 agreements are there. They are worth the paper they're  
4 written on and they took the time to do them.

5 Remember Dr. Virlar signed other agreements  
6 to establish the market rates here. We don't have to  
7 just take our word for it, Virlar said he entered into  
8 these agreements after Merida with two other hospices.  
9 They hired him, too. Altus and CIMA, they paid him  
10 \$7,500 a month and \$250 an hour. So that establishes  
11 our market rates, our checks are within the market rate.  
12 There's the evidence right there, straight from --  
13 straight from Virlar.

14 THE COURT: Mr. Canales, please wrap it up.

15 MR. HECTOR CANALES: Yes, sir. Let me  
16 scroll there. There's the agreement, there's the  
17 checks, fast forward here.

18 Verdict. I submit to you answer -- answer  
19 Count Two first because two sets the stage for  
20 everything else, not guilty. They didn't prove it.  
21 They don't prove Count Two everything else falls.  
22 Everything else falls. You've got to the specifics  
23 before you get to the general.

24 Count Two, Jack High, not guilty.  
25 Conspiracy, not guilty, you can't have a conspiracy.



1           Count Three, not guilty. Four, five, six  
2   and seven, not guilty. Once those go, everything goes.  
3   There can't be no money laundering or obstruction if  
4   there's no fraud. Not guilty count -- sorry, I'm trying  
5   to read up there -- Count 11, Count 12, Count 12 is the  
6   kickback. We've got safe harbor, we got McMillan, we've  
7   got the documents. And require, and hold the Government  
8   to their burden, ladies and gentlemen.

9           I wish I had more time, but you have the  
10   power to stand up for our system, to stand up for my  
11   client and to make sure that you hold the Government to  
12   their burden. Because if you don't do it, who will? If  
13   you don't do it now, when?

14           Thank you so much for your time. I  
15   appreciate it.

16           THE COURT: Thank you, Mr. Canales.

17           Ladies and gentlemen, let's go ahead and  
18   take a lunch recess. Please report back at 2:30 and we  
19   will reconvene.

20           Thank you, everyone.

21           COURT OFFICER: All rise for the jury.

22           (JURY OUT.)

23           THE COURT: Thank you, everyone.

24           We'll be in recess.

25           (COURT IN LUNCH RECESS.)

1 THE COURT: Thank you, everyone. Please be  
2 seated.

3 Ladies and gentlemen of the jury, welcome  
4 back. Again, thank you for your promptness.

5 Mr. Cyganiewicz.

6 MR. CYGANIEWICZ: Yes, sir.

7 THE COURT: And before you begin, you wanted  
8 a ten-minute warning before one hour, is that what you  
9 said?

10 MR. CYGANIEWICZ: Just at an hour would be  
11 sufficient, Your Honor.

12 THE COURT: All right. Thank you,  
13 Mr. Cyganiewicz.

14 MR. CYGANIEWICZ: May it please the Court.

15 THE COURT: Please, when you're ready.

16 MR. CYGANIEWICZ: Mr. Prosecutors, opposing  
17 counsel.

18 Good afternoon. I get stuck in the middle  
19 after lunch, so I'm going to try to be direct and not  
20 repeat a lot of things that Mr. Canales has talked  
21 about.

22 But I do also want to thank you for the  
23 attention, it's very, very, very serious matter and I  
24 know you've taken it seriously. Literally, Mr. McInnis  
25 on behalf of his family, his wife and kids also want to

1 extend his thanks, and on behalf of everyone in the  
2 courtroom, staff, everybody we try to accommodate you as  
3 -- as best we can.

4 But his future, his life will soon be in  
5 your hands and you will have to make a decision. And it  
6 will be easy to say, really, who cares, let's -- let's  
7 get out of here, I mean, they're all involved. I know  
8 you're not going to do that. You took an oath to base  
9 your decision on the evidence, and I'm sure you will. I  
10 know you've -- you've looked at the witness and  
11 considered their testimony.

12 I'm going to try to just, first, talk about  
13 some of the things in the Court's charge.

14 First of all, I know Mr. Canales talked  
15 about it, and I'll try to speak up, is that the  
16 Defendants, when they start, are presumed to be innocent  
17 and they start with a clean slate. And this burden of  
18 proof, this highest burden, Mr. Canales mentioned  
19 crossing the goal line, is on them and only them, and it  
20 never shifts. And I think you understand that.

21 I've tried cases around here for a while and  
22 some judges call it the -- the criminal -- beyond a  
23 reasonable doubt is the heavy weight burden. And the  
24 civil burden, a preponderance of the evidence is -- is  
25 the feather weight. It's more likely than not. Where

1 beyond a reasonable doubt you have to be sure before you  
2 take someone's liberty away. You have to be sure.

3 And your job, most important the Judge will  
4 tell you what the law is, and as we said what we say is  
5 not evidence, but your job is to decide the credibility  
6 of witnesses. You could choose to believe somebody in  
7 part or not -- not at all, or not believe anybody.

8 The Government has presented witnesses and  
9 Mr. Canales had told you time after time, we were just  
10 trying to get the truth out.

11 Their -- their, in my opinion, their  
12 credibility is at issue, and even the Government putting  
13 on witnesses like this, their -- their credibility is at  
14 issue.

15 Did they rush to judgment, did they rush?

16 Just for example, Ernesto Gonzalez, he can't  
17 still admit that whether the records say left and right  
18 fracture, that it's two fractures. He insists that his  
19 testimony three years today, or this week was better  
20 than it was four -- four years ago.

21 It's just that he's the one who says, oh,  
22 Ms. Conti, Ms. Conti, she should have never, ever been  
23 eligible for hospice, but he leaves Merida, goes to  
24 another company and then immediately signs her up for  
25 hospice.

1                   Now, that brings me to a point and -- out of  
2     the nine -- 9,000 patients the Government calls a cherry  
3     picking, whatever you want to call it, selective  
4     picking, just looking for ones, and they come up with  
5     these six patients out of the 9,000, and they'll say,  
6     well, we could have, you know, we could have taken three  
7     months and brought everybody in. Bring them in. Bring  
8     them in. If that's what it takes, I mean we'll stay  
9     here for a year if we have to. That's not an excuse.  
10    Bring them in, or bring eight in, bring ten in, bring 20  
11    in. .06 percent of the patients.

12                  And then when, really Mr. Canales and the  
13    Defense starts saying that, well, all these documents,  
14    all these patients, there's no fraud involved. They've  
15    all been certified and recertified by independent  
16    doctors.

17                  Did you notice the shift in strategy? It's  
18    like, uh-oh, well, maybe we didn't look at all those  
19    records. No, all the records are now fraud, every  
20    doctor involved is -- is corrupt. Gonzaba, all these  
21    other doctors who are not even charged, independent  
22    doctors, now everybody is involved, everybody --  
23    everybody's committing fraud.

24                  If there's no fraud on the hand-picked six  
25    patients, you just can't lump every -- this generic wide

1 brushing, I think they've used, it's vague, or is it  
2 just a major conspiracy. Where are the patients, where  
3 are the records? Show me one record where a witness has  
4 testified that Henry told him or her to change it?  
5 Where is that record?

6 He instructed me, well, and if we didn't get  
7 instructed, if we didn't do it, we would get fired.  
8 Just think about that for a second. Was there one nurse  
9 that testified that in fact she was fired? Out of all  
10 these nurses and -- not one was fired. Mr. Ernesto  
11 Gonzalez was fired because he was looking for another  
12 job, out there looking for and actually competing  
13 with -- with Merida.

14 He -- he joins Generations, and then I'll go  
15 through the list of witnesses, but then you have, I  
16 guess the anti-Merida conspiracy where you have Joe  
17 Aguilar and Eddie Zuniga leave, they form general --  
18 they form Generous, you have Dr. Virlar with his buddy  
19 and his best man Rolando Aguilera forming another  
20 company. Then you get Eddie Zuniga joining Rolando  
21 Aguilera in his new company.

22 And not does he not just join them, they're  
23 talking about their testimony. They're talking about  
24 the trial. They were warned about Mr. Canales'  
25 questioning. That's improper. Anything Mr. Zuniga

1 says, anything -- you can't even believe that. That's  
2 improper. They're talking and preparing amongst  
3 themselves.

4 And they'll say, we used the word script,  
5 every witness got up there, the same story, they or they  
6 or they or they or they did this, they did that, I would  
7 object and say, well, Your Honor, it's vague -- these  
8 are compounding questions.

9 I remember one, or two, or three instances  
10 where a lady after that type of testimony, I objected  
11 and said, well, no, Mr. McInnis was not involved, he was  
12 not involved in that discussion. He may have been  
13 present.

14 Or the best example is Dr. Virlar on the  
15 obstruction count. Oh, I talked to Henry, Henry, you  
16 know, change these records.

17 Your Honor, objection, ask him if he's --  
18 no, no, actually, I never had a direct conversation with  
19 Mr. McInnis about those records.

20 So let's talk about the obstruction and  
21 maybe hopefully get that out of the way.

22 Dr. Virlar and Roland are in San Antonio  
23 with a bunch of records. They're -- they're looking at  
24 records, they're doing something with records.  
25 Mr. McInnis is not present, Mr. McInnis had no

1 conversations with Dr. Virlar, and the two people there  
2 present are not charged with obstruction.

3 What Henry did was actually the opposite.  
4 He didn't say destroy records, get rid of these records,  
5 he said, send trucks to locations, we need to find these  
6 records, we've got to comply with the subpoena. There's  
7 nothing that controverts that.

8 And on the money laundering? Let's talk  
9 about that briefly. What money did Mr. McInnis get  
10 besides his paychecks? You hired -- the Government  
11 hires this guy what \$400 an hour, or \$365 an hour,  
12 that's all he does is work for the Government, he's  
13 probably billed other millions, he has an interest in  
14 the outcome; I'm saying he's lying, but he didn't have  
15 any contact with Mr. McInnis.

16 He puts up one exhibit where he paid 500,000  
17 over a seven or eight-year period. Is there -- and you  
18 know the Government has resources like you would not  
19 believe. They can look at bank records, they could find  
20 out what you had for lunch yesterday. They can -- all  
21 kinds of forensics. You know they went through his  
22 records, his bank records with a fine-tooth comb.  
23 Nothing. His paychecks. That's money laundering?

24 And then Mr. Canales said if there's no  
25 fraud, there's no money laundering, if there's no fraud,



1     there's no obstruction. There's no obstruction anyway.  
2     Not to Mr. McInnis, and there's no money laundering to  
3     Mr. McInnis. He got his paycheck. Like all the other  
4     employees he had a family to take care of, he was  
5     getting his paychecks. Are there bonuses, kickbacks?  
6     Where?

7                 So let's go back to the six patients.  
8     Again, I think the evidence is pretty clear, Mr. McInnis  
9     was -- was in Harlingen, he ran the day-to-day  
10    operation, did the scheduling, the payroll. He had no  
11    contact with patients. He had no contact with patients  
12    in San Antonio. He had no contact, or -- with patients  
13    in Laredo. I think one of those patients may be from  
14    Harlingen, but he doesn't have contact with the  
15    patients. He doesn't have contact. He can't admit, he  
16    can't discharge, he can't certify, he can't recertify,  
17    he can't even pay someone without being told who to pay.

18                He's running the day-to-day operations and,  
19    you know, he may have been forceful, maybe at times he  
20    was rude, I think Joe put it the best, Mr. Garza, he  
21    goes, yeah, from time to time he would yell. But if you  
22    believe all these other people, the last one was Martha  
23    Ramos where, you know, she's trying to say how Dr. Pelly  
24    is dirty and Henry comes in and starts -- she starts  
25    questioning him about why you're on vacation and says

1 he's intoxicated and he says, basically, you want to  
2 leave, go ahead and leave.

3 She leaves and then files a complaint. And  
4 she's saying, oh, Henry, Henry was instructing us. No  
5 what Henry was doing with Janina, let's talk about that,  
6 is regulations change all the time. Mr. McInnis had a  
7 meeting saying that the -- the regs need to be more  
8 specific now, you just can't say good, bad, you have to  
9 be more specific on the underlying symptoms, the  
10 underlying diagnoses.

11 And we saw the reports that I think I showed  
12 you briefly where one day Ms. Janina says it's 80  
13 percent, 70 percent appetite, three meals a day. A  
14 couple entries later, it's 60 percent, two meals a day  
15 and she says appetite's good. Mr. McInnis is having a  
16 meeting, and it's not just her, it's a staff meeting, it  
17 wasn't anyone one-on-one instruction or demanding that  
18 something be changed, because even today she says all my  
19 record are correct. She didn't change anything.

20 Show me one document that was changed  
21 because he told someone to change it? He's not a  
22 doctor, he can't sign anything, he's not a nurse.

23 And then she says, well, he was even at the  
24 IDT, IDG meetings. It's been consistent. She's the  
25 only person that ever said that. It's the chaplain, the

1 social worker, the nurse, the doctor, administrators  
2 don't go to those meetings.

3           You can look at all the records. I think  
4 there's one here from when I was questioning her where  
5 they list the people at the IDT meetings. Nurse, social  
6 worker, counselor, medical director, scribe throughout  
7 the entire time. Not Mr. McInnis, not the  
8 administrator. He's not at those meetings.

9           So let me jump back to your job as choosing  
10 a credibility of witnesses. The Judge instructs you  
11 that an important aspect is weighing the validity and  
12 character of each individual witness and testimony.  
13 Decide whether you believe all or any part.

14           And these are questions you should ask  
15 yourself: Did the witness have any reason not to tell  
16 the truth? Yeah, half of them are making deals. They  
17 have -- they want to make these people happy. They know  
18 that's why their sentencing isn't now, that's why their  
19 sentencing is being delayed to see what they say.

20           Joe Garza put it to bed, hey, a conviction  
21 would be a bonus for me. They want to make them happy.

22           And remember Mr. Canales, and I don't know  
23 if we have to spend a lot of time on these plea  
24 agreements, but it's solely the prosecution who decides  
25 whether they file this 5K motion requesting the Judge to

1     reduce their sentence.

2                 So you know they want to make the Government  
3     happy, you know they want the lowest possible sentence,  
4     you know they're looking for probation. They have to  
5     make them happy.

6                 So did the witness have any relationship  
7     with the Government? Did one witness's testimony differ  
8     from the testimony of other witnesses? Absolutely.

9                 In making up your mind or reaching a verdict  
10    you do not make decisions simply because there's more  
11    witnesses on one side.

12                And impeachment. Testimony of witnesses may  
13    be discredited by showing or fail to say or do something  
14    which is inconsistent with the testimony that we're  
15    given today.

16                Let me -- let me -- let me visit with you  
17    about that briefly, because you heard this throughout  
18    the trial you heard this expression, 302s. You maybe  
19    even hear that on TV sometimes.

20                A 302 is nothing more than a report by a  
21    Government agent sitting down at the table with the  
22    Defendant and his lawyers taking notes as well as they  
23    can about what was said. And a lot of these interviews  
24    as we talk about went back three, four years ago.  
25    Mr. Gonzalez, Ernesto, says, no, I don't even know if we

1 need to spend time on him, my memory is a lot better  
2 now. But the purpose is to document what was said.

3 And something else you may see on TV that  
4 really is not realistic is this trial by ambush. Maybe  
5 I'm outdating myself when I say it's not like Perry  
6 Mason used to do. I don't know if Perry Mason is still  
7 on TV, but you see all this stuff on TV where there's  
8 surprises at trial.

9 This is an open discovery process. We've  
10 gotten those 302s and those notes a year ago, if not  
11 longer. When you go through it, the -- the little  
12 anti-Merida conspiracy of Roland Aguilera, his best man  
13 Dr. Virlar, Mr. Zuniga, Mr. Aguilar, Ernesto Gonzalez,  
14 even Janina, four, five Dr. Carrillo, I don't know if  
15 he's still a doctor, they all were interviewed three or  
16 four years ago when, you would think that their memory  
17 would be a lot fresher.

18 None of them said what they said in the  
19 courtroom this week. None of them really mentioned  
20 anything about Henry instructing fraud three or four  
21 years ago.

22 Joe Garza didn't say it until last week.  
23 Because every time they would meet with the witness,  
24 we'd get another report. Okay, well he's still -- and  
25 then when they get these -- when they testify, well, no,

1 when did you ever say that before? Wasn't your memory  
2 better then? Wasn't it closer to the event? Weren't  
3 you told to tell us everything you know? You don't  
4 think Mr. McInnis instructing people to commit fraud was  
5 important? No, it just gets more important as you get  
6 closer to trial because they want to make these people  
7 happy. They want to make these people happy.

8 And, you know, maybe some of you thought  
9 about this, but why not record the interviews? As a  
10 matter of fact, I think one witness Dr. Virlar said one  
11 was recorded. We never got that recording, we never --  
12 you never heard that recording. There was another  
13 recording with Dr. Virlar and his 19-year-old girlfriend  
14 about how they're committing IRS fraud, you didn't hear  
15 that conversation on tape.

16 Why not record it? You know why, because  
17 it's open to interpretation if it's not recorded. You  
18 can decide, well, I don't remember him saying that, or  
19 no that's not what he meant, but if you have it  
20 recorded, video or tape with all the resources this  
21 Government has, with all the investigators, with these  
22 ten or 30 people in the courtroom, they don't want to  
23 record a statement or an interview of an important  
24 witness, you know why. So what, we're to told it  
25 against Mr. McInnis, it's his fault they didn't record

1 him?

2 Half of my questions was, well, why are you  
3 saying this now for the first time? I mean, we could  
4 eliminate all that, let's hear what you said. Show me  
5 on that tape where you say Mr. McInnis instructed you to  
6 do anything. It doesn't exist.

7 And you know, and -- and they all made  
8 deals, and Joe, no matter what you believe, Henry, don't  
9 worry, Henry didn't do anything wrong. Don't -- oh no,  
10 no, no, no, my lawyer said that. No, Joe, that's not  
11 the way it happened. You were right next to your  
12 lawyer, he may have heard what you said but, no, don't  
13 worry, Henry didn't do anything wrong.

14 Well, three days before trial they meet with  
15 them, now he's saying now Henry told him this and Henry  
16 told him that. He always said Henry ran the day-to-day  
17 operations in Harlingen.

18 Eddie Zuniga ran the day-to-day operations  
19 in San Antonio. So any dealings with patients or staff,  
20 that's Mr. Zuniga in San Antonio. He was -- I think one  
21 of the witnesses, maybe Belinda, said that, yeah, I was  
22 in Harlingen for a week trained by Mr. McInnis and then  
23 I went to San Antonio and he was really never around in  
24 San Antonio.

25 But they want you to think, they want you to

1 believe that he's just in charge, if Rodney knows  
2 something then Henry knows something. Even one of the  
3 witnesses saying, yeah, I'm assuming that Henry told the  
4 nurses that.

5 This is not a place to assume anything.

6 This is not a place to assume anything.

7 It's they, they, they, they. Well,  
8 objection. Well, no, I didn't speak to Mr. McInnis, no  
9 Mr. McInnis was not involved in that conversation.

10 Even if you believe -- I don't think it's  
11 been proven. They haven't met that burden, that high  
12 burden. Even if you believed there was a conspiracy,  
13 what was -- what was his role? I mean, he doesn't even  
14 have any contact with those patients. If he's not  
15 dealing with those patients and if they're saying, no,  
16 he can't certify, recertify, he's doing his job. If --  
17 if -- what's his role?

18 They, they, they, just want to mix it all  
19 up, make these vague general accusations. Once you tear  
20 down the fraud involved and the six patients, what else  
21 is there?

22 Oh, don't be afraid, bring in more patients.  
23 No, there's just a general atmosphere of fraud.  
24 Everybody's committing fraud. All those documents are  
25 fraud. You can't rely on those documents. They don't



1 even get to that strategy until we show that all these  
2 patients were certified and recertified, Mr. Canales  
3 pointed out by independent doctors who are not charged.

4 Dr. Virlar plead guilty to some sort of pain  
5 cream scam he had going, had nothing to do with Merida.  
6 Castillo plead guilty to some scheme where he's billing  
7 for dead people. Which reminds me, the patients, these  
8 9,000 patients were provided services. They're  
9 complaining that they got an electric wheelchair instead  
10 of a manual one? Would they complain if they got  
11 crutches instead of a wheelchair? They were provided  
12 services.

13 You know, some -- really, I think we heard  
14 two complaints from patients over the 9,000 about maybe  
15 not having supplies, or not liking -- Ms. Conti didn't  
16 like Mr. Mesquias, didn't like the bedside manner and  
17 what he was saying. Out of all those, one or two  
18 patients. You can't just generalize. And everything's  
19 fraud. You can't trust those documents, you can't trust  
20 those doctors, you can't trust those nurses.

21 That goes to the credibility of the  
22 witnesses. As I just explained and the Judge says, he  
23 even says when someone's made a deal, you need to look  
24 at that carefully and with caution.

25 The burden of proof. Defendants are always

1 assumed -- presumed innocent.

2 Indictment, I read to you is not evidence of  
3 any guilt, it sounds horrible but where's the evidence?

4 The law does not require the Defendants to  
5 prove their own innocence. The law requires the  
6 Government to prove Defendant is guilty each and every  
7 element of the offense beyond a reasonable doubt.

8 And then more importantly, a reasonable  
9 doubt is doubt based on reason and common sense after  
10 careful and impartial consideration of all evidence.  
11 Proof beyond a reasonable doubt is proof so persuading  
12 you would be willing to rely and act on it without  
13 hesitation in making the most important decisions in  
14 your own affairs.

15 Really? Without hesitation, without pause  
16 you're going to believe Dr. Virlar, Dr. Carrillo,  
17 Rolando Aguilera, Joe Garza, Ernesto Gonzalez, Joe  
18 Aguilar, they don't say anything about this three or  
19 four years ago, but now they're trying to make everybody  
20 happy. Their credibility is at issue, the Government's  
21 credibility is at issue presenting witnesses like this.

22 Dr. Virlar is, I have no integrity.  
23 Dr. Carrillo, I have a history of lying, I'm not known  
24 to be a truth-teller. But doc, you want them all to  
25 believe the truth, you want them to believe you today,

1 right? Oh, yeah, oh yeah, today I'm changing, today I'm  
2 changed, today I'm telling the truth.

3 Would you depend on them for important  
4 decisions, your children, your family? There's got to  
5 be hesitation.

6 Now, during the trial I think there was 16  
7 or 17 witnesses, I'm sorry, I still got to use the  
8 yellow pad, but there were at least ten or eleven  
9 witnesses, some I didn't even question had nothing to do  
10 with Mr. McInnis.

11 Laurie McMillan, Ms. Conti doesn't know him,  
12 Amber Kelso, I don't think I had any questions, Diana  
13 Navarro, Neal Williams never interviewed the Defendant.  
14 The case agent here, you never heard from Mike Garcia,  
15 he was sitting here the whole trial. No other FBI  
16 agents.

17 Melissa Hernandez, Belinda Gonzalez, I was  
18 in Harlingen one week and Henry didn't direct me to  
19 change records.

20 Dr. Escamilla, I don't think I asked any  
21 questions, or Dr. Gonzalez.

22 Then you had Mr. Petron to put on a big show  
23 for, what, \$300,000 to just tell us how much Mr. McInnis  
24 got paid.

25 And Martha Ramos. I guess they didn't know

1 that she was evicted by someone from Dr. Pelly's office.  
2 All her complaints were against Dr. Pelly and Henry and,  
3 you know, Henry told her to leave if you don't like it.  
4 So she leaves, starts complaining about Dr. Pelly and  
5 files a complaint.

6 And I asked her, do you know anybody, or  
7 have you ever known anyone who worked for Dr. Pelly?

8 Oh, no, no, no, no.

9 Well, how about your mother-in-law?

10 Well --

11 Aren't you divorced?

12 Yeah.

13 Oh, you're not angry with her?

14 No.

15 She didn't evict you from your house?

16 Oh, yeah, yeah, she evicted me from my house  
17 and Henry yelled at me, but I'm not mad at any of those  
18 people, I'm here to tell the truth.

19 That's credibility issues.

20 So who do you have left, Ernesto Gonzalez?

21 Really? That's not his signature? That's not two  
22 fractures, my memory is better today than it was ever  
23 before.

24 Jose Aguilar who left to start a competition  
25 or competitor, and then you have Carrillo, history of

1     lying, stealing medicines from his own patients, a drug  
2     addict, liar, history of lying. And remember, he was  
3     honest about one thing. The last question I think I  
4     asked was, aren't you saying this for the first time  
5     about Mr. McInnis? Yeah, yeah, basically I am.

6                     And then he -- he tried to emphasize how  
7     Henry's -- no, no, you don't -- he actually said that,  
8     no, you can talk to him on the phone. But Henry never  
9     said that. Remember, I had to come back and explain it?  
10    No, we're talking about this tele-medicine, telethon  
11    medicine and screen to screen. You can't believe  
12    anything Carrillo said, you can't really believe  
13    anything Virlar said, or if you believe parts of it, you  
14    have to have some hesitation, you have to have some  
15    pause, you have to have some doubt, you have to have  
16    some questions.

17                    So you have left, Aguilar, Carrillo, Virlar,  
18    Roland, Joe Garza. Disgruntled employees are people  
19    making deals.

20                    And can anybody point out one record that  
21    was changed because Mr. McInnis instructed someone to?  
22    No, it's just this, no, it was the atmosphere of fraud,  
23    everybody was committing fraud, all the records are  
24    fraud, all the witnesses are lying. They have to do  
25    that after we show that the six patients there was no

1 fraud involved at all.

2           People with deals want to make the  
3 Government happy. They want you to believe they're  
4 telling the truth today, that their memory is better  
5 today, never made these statements about Henry before.  
6 They'll say anything to stay out of jail, to --  
7 Carrillo, I plead guilty and cooperated to stay out of  
8 jail. Virlar, I have no integrity. This ties into the  
9 re -- the required burden of proof, beyond a reasonable  
10 doubt, the highest burden.

11           How sure do you have to be? I'll submit to  
12 you maybe, probably, likely, that's not sufficient. You  
13 have to have some doubts. The highest burden of any  
14 type of case. Why do you think that is? Because you're  
15 fighting for someone's life, not more money. You have  
16 to be sure not more likely than not.

17           Different than a civil case? Of course.  
18 How sure? Not maybe, not possibly, not sure is not  
19 beyond a reasonable doubt. That's the law. You've  
20 taken oaths to find it, follow it. I wouldn't rely on  
21 any of those witnesses.

22           Look at the evidence, look at the witness --  
23 list of witnesses. I've talked to you about the 302s,  
24 the deals, that's why the sentencing is delayed.

25           And the Government will probably get up here

1 for the last 20 minutes and say, well, we have to make  
2 deals to get justice.

3 Well, these guys only made deals after they  
4 got caught. I agree with Mr. Canales, I think Joe got  
5 scared, threatened to lose his house, never said  
6 anything like this about Mr. McInnis before, tells me,  
7 don't worry, Henry didn't do anything wrong.

8 But if you remember the testimony about  
9 Dr. Carrillo, Joe's the person who dealt with  
10 Dr. Carrillo on a daily basis, the patient files, the  
11 855s, he is the one who was dealing with Dr. Carrillo.

12 Their future, these witnesses, depends on  
13 the prosecutors, and as I said, Joe said, oh, yeah, a  
14 bonus would be -- a conviction would be a bonus.

15 They, they, they. Where's the -- where's  
16 the evidence? Where's the supporting evidence? Where's  
17 the phone records? Where's the bank records? Then when  
18 medical records are shown to be certified by  
19 legitimately, it's like, oh, no, we can't rely on those  
20 witnesses now.

21 One thing, I think -- I may have been the  
22 first person to bring that up, throughout the whole  
23 trial I think you were -- there was an attempt to leave  
24 you with an impression that no one dies on hospice.  
25 Even though it was like close to one person a day, 20 or

1 25 a month, 20 or 25 percent of the whole population.  
2 These people were being serviced. Again, it's not like  
3 Dr. Carrillo, where, okay, that lady's dead, I'm going  
4 to bill. They're getting services.

5 Some of them aren't all happy, but out of  
6 9,000, I think we saw two -- two people that had some  
7 sort of complaint. Out of the 9,000 we saw six that  
8 were specifically named, and you know before they did  
9 that, they had to go and try to find the best six, or  
10 maybe they didn't even look.

11 And then when we talk about those six on how  
12 these are legitimate patients with legitimate hospice  
13 needs, oh, no, we can't rely on any of those records  
14 even though none of the Defendants are even involved.  
15 Gonzaba, Patricia. Where are the nurses that were  
16 fired? Oh, no, if we don't do this, we're going to get  
17 fired.

18 Where's the nurses that got fired? I think  
19 they could find them if they wanted to, or if they even  
20 existed.

21 Where are the specific medical records that  
22 Henry instructed others to commit fraud? No contact  
23 with those patients.

24 I talked to you about the obstruction, what  
25 Mr. McInnis wanted to do was just get those records, we



1 need to get those records. He's not in San Antonio,  
2 he's not talking to Dr. Virlar. Virlar and Roland are  
3 over there doing it and they don't even get charged.

4 And I think Ms. McMillan and Mr. Canales  
5 talked about there's no hard limit if the disease runs  
6 its normal course, it could be more than six months,  
7 even though Janina said, no, it's either six months  
8 or -- I'm sure it's six months, you have to die within  
9 six months. No, there's no limits on recertification,  
10 there's no billing for dead patients in this case,  
11 doctors are required to certify, Henry's not at these  
12 IDT or IDG meetings, doctor, social worker, nurse.

13 He does have a meeting about the changing  
14 the codes and need to be more specific. Janina says,  
15 oh, he's always at those meetings even though there's  
16 nothing there saying Mr. McInnis was present. Even  
17 Mr. Zuniga said that administrators don't go to those  
18 meetings.

19 There's a lot of general vague testimony  
20 regarding Henry and the fraud. My question is, you have  
21 to have some sort of hesitation, you have to have some  
22 sort of doubt. No contact with these patients.

23 Joe, don't worry, he didn't do anything  
24 wrong.

25 Henry was an employee trying to help and

1 support his family like anyone else. He had a duty to  
2 run the day-to-day operation, the scheduling, the  
3 payrolls. He's not an owner, does not make final  
4 decisions, can't order payments, can't decide who gets  
5 paid, only gets his paychecks, cannot certify, cannot  
6 recertify, cannot admit, cannot discharge, can't force  
7 doctors or nurses to change records.

8 Well, but if we don't, we'll get fired.

9 Who was fired?

10 Can't sign medical records, I'm not at the  
11 IDT meetings, cannot assess patients. He didn't submit  
12 claims to Medicare. Maybe forceful, yeah, he yelled  
13 from time to time. Yeah, maybe he went to Vegas. You  
14 know how common it is for law firms, or banks, or  
15 corporations to have season tickets for Spurs or any  
16 team? You know how common it is for a business to take  
17 their employees as a reward to -- on a trip, or to  
18 recruit employees, or to entertain doctors or to  
19 entertain patients?

20 No contact with those patients.

21 Not one specific record that he did anything  
22 regarding these patients. No fraud involving the six.  
23 He's not in San Antonio, he's not in Laredo. These  
24 generic, general terms they, they, they, it's just not  
25 sufficient.

1           The Judge tells you that even if you believe  
2           there's some sort of conspiracy associating or working,  
3           that doesn't make you guilty. Presence alone is not  
4           guilt. You have to be willfully, knowingly  
5           participating in the conspiracy.

6           Bottom line is that the evidence is just not  
7           sufficient to support that as to Mr. McInnis.

8           I think the right thing to do would be to  
9           find him not guilty. He tried to comply with the  
10          subpoena. There's no extra money except for his  
11          paychecks, had no contact with these patients. Those  
12          six patients don't involve fraud, you can't just throw  
13          in the big generic general conspiracy.

14          What benefit did he receive besides his  
15          paycheck? It's not sufficient. It's not sufficient.  
16          It's not close. Do the right thing. Mr. McInnis is not  
17          guilty.

18          Thank you.

19          THE COURT: Thank you, Mr. Cyganiewicz.

20          Ladies and gentlemen, do we need a break?  
21          Anybody?

22          All right. Mr. Guerra.

23          MR. GUERRA: Yes, Your Honor. Thank you.

24          May I have a 30-minute warning, please, in the event  
25          such is needed?

1 THE COURT: Please proceed.

2 MR. GUERRA: Thank you, Your Honor.

3 May it please the Court, co-counsel, counsel  
4 for the Government.

5 Ladies and gentlemen of the jury, good  
6 afternoon. I know usually over the past two weeks when  
7 you've seen me, that means that we're almost done with  
8 whatever it is we're doing, be it a witness or whatever,  
9 if I come up, that's means we're almost at the end of  
10 the line, and that's actually correct.

11 After I finish speaking and speak on behalf  
12 of my client, Dr. Pena, you will get the chance to hear  
13 from the Government one last time. But before we do all  
14 that, on behalf of Dr. Pena and co-counsel Adriana  
15 Arce-Flores, I do want to extend my deepest thanks to  
16 all of you.

17 I know that this is something different, out  
18 of the norm than what you normally do. I know this has  
19 been a very difficult case, very technical. You know,  
20 it's not everyday that all of us get to go through  
21 oodles and oodles of medical records, but yet here we  
22 are.

23 And I can say I appreciate, and I know  
24 Dr. Pena appreciates your attentiveness throughout this  
25 entire endeavor. And we appreciate the decision and the

1 hard work that you're going to do that followed up on  
2 the two weeks that you've done.

3 We know when you go back there, you're going  
4 to listen to everything, consider it, and when it's time  
5 to issue your -- your verdict, you will do your job.

6 So having said all that, the end justify the  
7 means. That's what the Government is presenting to you  
8 right now. The ends justifies means.

9 Lies, rumors, assumptions. Government  
10 informants, expert witnesses bought and paid for by the  
11 Government, cooperating witnesses. This is the  
12 evidence, ladies and gentlemen, that the Government is  
13 presenting to you in the hopes that it carries the day  
14 against my client Dr. Francisco Pena.

15 They think by showing you this evidence, you  
16 will find that they have met their burden and proven  
17 every single element in that count, in that charge  
18 beyond a reasonable doubt.

19 When we started this journey together about  
20 two weeks ago, I said -- I stood right here in front of  
21 you and I told you that as we listen to the evidence,  
22 the Government would not be able to provide any direct  
23 evidence, any direct testimony that Dr. Pena conspired  
24 with the co-Defendants to commit Medicare fraud.

25 There was no direct evidence that Dr. Pena

1     conspired with the co-Defendants to authorize hospice  
2     services for patients who didn't qualify. No direct  
3     evidence that he conspired to launder money, and  
4     absolutely no evidence, at all, to show that he  
5     conspired with Mr. Mesquias to violate the Anti-Kickback  
6     Statute. None.

7             Over the course of two weeks, witnesses came  
8     up to this very witness stand, took an oath, talked to  
9     all of you, and over and over again we waited for that  
10    direct evidence. And over and over again that direct  
11    evidence never came. Why? Because it's simply not  
12    there.

13            What do we know? What evidence did we hear  
14    about Dr. Pena? Well, he is a long time doctor out of  
15    Laredo. A medical director for Professional Hospice.  
16    Not forever. For 2012 to 2016. And he got paid by  
17    contract a medical director services fee.

18            And we have that in evidence, ladies and  
19    gentlemen. Here it is. Rodney Mesquias number two.  
20    Contract for the directorship for the Merida Group there  
21    in Laredo starting March 14th, 2016.

22            Now, we've heard a lot about safe harbor and  
23    the provisions that go into safe harbor, and Laurie  
24    McMillan talked about it that it's fine. Mr. Canales  
25    talked about it.

1           This directorship agreement, RM-02, for a  
2     year. For the standard rate that people in and around  
3     the area, fair market area, pay for medical  
4     directorship. Their own expert, Laurie McMillan,  
5     couldn't even tell you what fair market value was.  
6     Didn't even conduct a survey.

7           Yet, we can go in and offer testimony that  
8     these director agreements were shams, veils, fraudulent.  
9     Based on what? Where is the direct evidence to show  
10    that?

11           And at the end of the day, Rodney -- Rodney  
12    Mesquias Exhibit Number 1, this is Dr. Pena's, basically  
13    his letter to Merida saying that as of January 4th, 2017  
14    we're done. We're no longer in an employer/employee  
15    relationship.

16           And oh, by the way, you owe me \$11,500 for  
17    medical director services actually rendered. That's in  
18    evidence. You can look at it. Page 2 is the invoice  
19    showing that he actually performed those services and  
20    was requesting payment for those services.

21           Now, the question I have for you, ladies and  
22    gentlemen, is if this is a sham, if this is a fraud, why  
23    are we documenting it? Why do we have a contract  
24    talking about, hey, this is what we're going to do. Oh,  
25    bit way, it's a fraud, it's a sham. Here's my letter

1 asking you to pay me for services, here's an invoice but  
2 it's all fake.

3 Do you really believe that's the case?

4 Is there any testimony that no medical  
5 services were rendered here? No. Absolutely not.

6 The question is whether or not these  
7 services were medically necessary and were, in fact,  
8 legitimate. And I'll argue to you that it was.

9 Now, on behalf of Dr. Pena, the question I  
10 have for you, ladies and gentlemen, is what evidence  
11 have you heard directly for Dr. Pena? The witnesses who  
12 came up here talked a lot about Rodney Mesquias and  
13 Henry McInnis, but did you ever hear any evidence, any  
14 testimony of Dr. Pena going to Harlingen?

15 Did you hear any evidence, any testimony of  
16 Dr. Pena going to San Antonio, Houston, Corpus, or any  
17 other Merida location?

18 You never heard any evidence, never saw any  
19 test -- never heard any testimony or saw any evidence of  
20 Dr. Pena having a conversation with Rodney Mesquias,  
21 Henry McInnis, Jose Garza, or any other administrator in  
22 Merida to talk about this alleged conspiracy that he was  
23 engaged in.

24 You never heard of any conversations that he  
25 had with Virlar and Carrillo, that he allowed them to go



1 through his medical files and falsify documents.

2 You never heard any evidence that Dr. Pena  
3 allowed any other doctor to go through his files and  
4 falsify medical records.

5 You didn't hear any testimony of Dr. Pena  
6 going to -- to Las Vegas, Spurs games, any other perks,  
7 privilege that Mr. Foster talked about earlier this  
8 morning that were afforded medical directors who played  
9 ball. Dr. Pena never had that.

10 And then of course, you know, we've talked a  
11 lot about Michael Petron, you know the million-dollar  
12 man, he's billed over \$1,000,000 to the Government, at  
13 least in his career. I don't know about you, but when I  
14 was cross-examining Mr. Petron, and had him on the  
15 stand, I was waiting for the other shoe to drop. I was  
16 waiting for him to say and, oh by the way Mr. Guerra,  
17 guess what, not only do we have all this financial  
18 information, I had the secret bank account where I can  
19 show you that Rodney Mesquias, on behalf of Merida, was  
20 funneling hundreds of thousands of dollars in kickbacks,  
21 benefits, something to Dr. Pena for patient referrals.

22 Did we get that? No.

23 Mr. Petron just said I saw that Merida paid  
24 Dr. Pena \$108,000 over the course of his five-year term  
25 of employment with the company. And again, I got

1 Mr. Petron to confirm my lawyer math that that's a  
2 little about two -- \$20,000 a year, which is consistent  
3 with the medical services agreement that Dr. Pena  
4 entered into with Merida.

5 There's nothing wrong with that. There's  
6 absolutely nothing wrong with that. And Mr. Petron  
7 couldn't show you anything else. He went through time  
8 and again charts, bank accounts, all these other  
9 benefits that maybe somebody else was getting. Virilar  
10 was getting it, Carrillo was getting it, but not  
11 Dr. Pena.

12 But the Government wants to you assume, hey,  
13 let's just sweep in Dr. Pena, he's a medical director,  
14 so is Carrillo, so is Virilar, let's get everybody  
15 together and we can convict them all.

16 That's not how it works, ladies and  
17 gentlemen, and you know that. You took your oath, you  
18 -- you will have your charge, you have your Bible, your  
19 instruction manual of what the Government has to prove.

20 And I am telling you right here in this very  
21 spot where we started it all off two weeks ago that the  
22 Government has not met their burden of proof to show  
23 that Dr. Francisco Pena has committed any of the crimes  
24 beyond a reasonable doubt.

25 Any attempt by the Government to show that

1 Dr. Pena was part of this massive statewide conspiracy  
2 is not only inaccurate, it's just dead wrong.

3 And there's something else. What other  
4 evidence did the Government not show you? What other  
5 witnesses didn't come up here to testify against  
6 Dr. Pena? Francisca Perez is alive, we heard that, we  
7 never heard from her. We never heard from a family  
8 member for Francisca, and don't you think that would  
9 have been helpful? If Francisca was in bad shape,  
10 wouldn't a family member have been able to come in and  
11 say, oh, my gosh, Dr. Pena was just a horrible doctor,  
12 he never helped my mom, never helped my grandma? Never  
13 heard that.

14 Never heard testimony from any of Francisca  
15 Pena's current medical providers right now. All we get  
16 is the recollection from Neal Williams. She called me  
17 Guero. Okay. Well, we know she's alive, but what's her  
18 condition? What has her condition been like since the  
19 time of the certification period until right now?

20 We don't know. Dr. Pena doesn't have that  
21 burden of proof, the Government does.

22 And when we're speaking of witnesses that  
23 were not called, where are the nurses, the  
24 administrators, the intake clerks, all those individuals  
25 that you heard a parade coming in talking about the

1 other Merida locations, where are they criticizing  
2 Dr. Pena, saying that he was authorizing hospice  
3 services for people who were not qualified? They're not  
4 there.

5 The closest I could think of getting ready  
6 for this was they brought in Roland Aguilera. How many  
7 IDT meetings did Roland Aguilera go to; do you recall?  
8 I can tell you, one. That's it. One.

9 And you know what his big complaint was?  
10 Dr. Pena talked about himself and the meeting didn't  
11 last very long. Okay.

12 But you know what Roland Aguilera also  
13 admitted? There is no set timeline for an IDT meeting,  
14 first of all; second of all, Roland couldn't tell you  
15 whether or not Dr. Pena did or did not do his job in the  
16 IDT meetings. His biggest concern, his biggest  
17 complaint, his biggest gripe was that Dr. Pena talked  
18 about himself, and in his estimation it was too short.  
19 That's it. Is that a crime? Is that fraud? Is that  
20 something that you can convict on? Absolutely not.

21 I don't want belabor the point, but I think  
22 it's a point that I have to make on behalf of my client  
23 and it's this. The Government was painting in  
24 generalities, broad strokes. All the Merida files  
25 are -- are fraudulent, therefore, you can't trust them.

1 Corruption is everywhere because everybody was doing it.  
2 It existed on all levels.

3 Joe Garza got up on this stand as part of  
4 his plea, took an oath to tell the truth, hopeful he's  
5 going to a reduction in his sentence, one of the first  
6 questions he was asked by the Government, if you recall,  
7 was a very direct question -- in the legal parlance we  
8 call it leading, it's something that we do in  
9 Cross-Examination all the time, but the question was:  
10 Mr. Garza, isn't it true that you entered into a  
11 conspiracy with Dr. Pena to commit Medicare fraud? I  
12 objected; Judge asked to rephrase.

13 When the non-leading question was asked, you  
14 remember what Joe Garza's reaction was? He stumbled.  
15 He didn't know what to do.

16 And finally he came around and said, oh,  
17 yeah, um, um, yeah, Dr. Pena.

18 So when I took him on Cross-Examination, I  
19 asked him: Why did you say that? You had one  
20 conversation maybe your entire life with Dr. Pena, how  
21 could you tell the ladies and gentlemen of the jury that  
22 you conspired to commit Medicare fraud?

23 Do you recall what his answer was? I  
24 assumed. I assumed.

25 Can you base a conviction beyond a

1 reasonable doubt on an assumption? Especially an  
2 assumption by a witness who has a deal to make those  
3 type of assumptions. It's in his best interest to do  
4 so.

5 And, look, Joe Garza, you remember his  
6 testimony. He met with the Government before, during  
7 and after his plea. At no point until he took that  
8 stand did he ever mention Dr. Pena to the federal  
9 government at all.

10 He talked about Pelly, he talked about  
11 Posada, he talked about a couple of other doctors in the  
12 lead up to this trial. But all of a sudden he gets up  
13 here, and oh, yes, we conspired. It's Medicare fraud,  
14 absolutely. Under the penalty of perjury, we committed  
15 Medicare fraud.

16 Do you believe him? I don't.

17 Generalities. We'll talk about the videos  
18 later on, but there was something coming out of those  
19 videos. Jose Aguilar, Neal Williams, those were the two  
20 people, the custodians of those videos who came out here  
21 to show you everything that was happening on those  
22 videos.

23 They said Dr. Pena received money to  
24 transfer patients, kickback, referral, done. Okay.  
25 Agent Williams, were those patients ever transferred? I

1 didn't follow-up on that. Mr. Aguilar, those patients  
2 get transferred? I -- I -- I -- I don't know. Maybe.  
3 I think they -- maybe they died.

4 I don't know and maybe isn't enough for a  
5 conviction. It's not.

6 Mr. Canales and Mr. Cyganiewicz told you  
7 what beyond a reasonable doubt is. I don't know and  
8 maybe, that's just more than reasonable doubt, that is  
9 substantial doubt.

10 And that's crucial, ladies and gentlemen,  
11 it's crucial because what are we asking you to do?  
12 We're asking you to convict individuals of a crime.  
13 Wouldn't you want specificity? Names, dates, people,  
14 places, times. Not only would you want it, I think you  
15 would require it.

16 But again, here we are painting with a broad  
17 brush. And in fact, even this morning, even this  
18 morning Mr. Foster kept talking about Defendants,  
19 Defendants, Defendants this, Defendants that. It  
20 doesn't work that way.

21 When he said Defendants instructed Amber  
22 Kelso, Defendants instructed Belinda Gonzalez, there was  
23 never any testimony at all that showed Dr. Pena had any  
24 sort of relation, any sort of knowledge of more than  
25 half of those witnesses.

1           If you noticed there was a reason why myself  
2           and Ms. Arce-Flores never asked questions, or if we did  
3           we asked one or two questions of a witness. And why is  
4           that? It had absolutely nothing to do with either our  
5           client, or what he was doing in Laredo. Period.

6           Yet, the Government continually wants you to  
7           say, well, all the Defendants were doing this, and all  
8           the Defendants were doing that. No, ma'am. No, sir.  
9           To convict somebody beyond a reasonable doubt doesn't  
10          work that way.

11          And I think there was something else going  
12          on throughout the trial, something odd and I'm sure you  
13          noticed it too. It bordered on the verge of something  
14          miraculous, you know, witnesses as Mr. Cyganiewicz said,  
15          all of a sudden their memories got a little bit better.  
16          Two, three, four years after a certain incident, two  
17          three, four years after they may have met with the  
18          Government for the first time. All of a sudden their  
19          memory comes back. Maybe they took a special pill, I  
20          don't know.

21          But witnesses who at no point had either  
22          described a conversation or a meeting with Dr. Pena, all  
23          of a sudden are coming up on this stand and saying,  
24          whoa, yeah, I got it. Now -- now I remember, here in  
25          2019 I remember there was this one time in 2015 that he



1 told me to do X, Y and Z, that he told me to commit this  
2 crime.

3 Why is that? I mean, is that really a  
4 function of their memory coming back? I don't think so.  
5 That gives me reasonable doubt. It gives me significant  
6 doubt.

7 I think the more rational explanation is  
8 simply they understood what they needed to say, exactly  
9 what they needed to say to further their own interest.  
10 Whatever it may have been, whether it was for a deal,  
11 whether it was to have a personal axe to grind, whether  
12 it was to advance their own businesses that are going  
13 outside. Whatever it is, these witnesses knew exactly  
14 what they had to say to further their own interests.

15 Simple as that.

16 And so one of the -- the most important  
17 witnesses that I can think of was Ernesto Gonzalez. And  
18 I know Mr. Cyganiewicz and Mr. Canales talked about  
19 Ernesto Gonzalez, but, to me, I was wondering, where --  
20 where does Ernesto fit in with all of this? I got my  
21 answer this morning. The Government was using Ernesto's  
22 testimony on this witness stand to tell you that they  
23 had proven beyond a reasonable doubt that Dr. Pena  
24 conspired with co-Defendants to defraud Medicare. They  
25 were using Ernesto Gonzalez' testimony to show that.

1                   And what was his testimony? His testimony,  
2 he came up with this wild story that Dr. Pena invited  
3 him into his office at some point in 2015 and said, take  
4 a look at all the patient files you want and whatever  
5 qualifies sign them up. I'm good. Do it.

6                   There's just a slight problem with that,  
7 ladies and gentlemen. At no point prior to Mr. Gonzalez  
8 taking that witness stand had he ever said anything like  
9 that at all.

10                  Remember, Ernesto Gonzalez, he was racked  
11 with guilt, he had to leave Merida, he was having  
12 trouble sleeping because of all the fraud that was going  
13 on. He meets with Dr. Pena in 2015, 2016, and remember  
14 I drew out the timeline for you on the ELMO over here.

15                  First time he meets with the federal  
16 government, January 2017. Does he talk about Dr. Pena?  
17 Not at all. Someone who has got such a guilty  
18 conscious, got so much on his mind that he's physically  
19 affected by what he's seeing doesn't blow the whistle.  
20 Well, give him the benefit of the doubt. Fast forward  
21 to March, 2017.

22                  Again, Ernesto slept on it some more, and he  
23 still -- he told you, I'm still racked with guilt, I  
24 don't know what's happening, I have to get this off my  
25 chest.

1                   So what does he do? He tells the FBI, well,  
2 maybe I overheard some people saying that Dr. Pena  
3 approached them. Okay.

4                   Racked with guilt some more. Does he go  
5 contact special Agent Garcia? He's been to his office  
6 twice already, he's met with him. No. He waits. And  
7 he waits and he waits and he waits two years before he  
8 says anything else.

9                   Coincidentally, if you want to believe him,  
10 before trial started you want to believe me, at the time  
11 trial started. But either way, why wait two years to  
12 all of a sudden have a great recollection of this  
13 massive fraud that you were being asked? And oh, by the  
14 way, he never did it. He said he was asked to go  
15 through those files but he never did. If you believe  
16 him, which I tell you, you should not.

17                  And that brings us to Mr. Jesus Virlar. We  
18 shouldn't call him doctor anymore even though he's  
19 listed as a doctor. And what is he really? And I'm not  
20 going to call him names, you've heard it all, but we  
21 know what motivates Mr. Virlar to reduce his sentence.  
22 That's what he wants, that's what he came in here to do.

23                  And again, Mr. Virlar was asked, did you  
24 conspire with Dr. Pena to commit Medicare fraud? Yes, I  
25 did. That was his answer. Okay.

1                   Again, like Ernesto Gonzalez, Dr. Virlar,  
2                   Mr. Virlar must have had a great surge in memory, maybe,  
3                   you know, he took some Ginseng, or something like that  
4                   because all of a sudden, oh, yeah, I -- I did conspire  
5                   with Dr. Pena to commit Medicare fraud. The only  
6                   problem is Dr. Virlar never told anybody that he did.  
7                   And in fact, over the course of his entire lifetime,  
8                   Dr. Virlar maybe had one, maybe two conversations with  
9                   Dr. Pena ever.

10                   And that one conversation he had was at  
11                   Dr. Virlar's insistence. He wanted to meet Dr. Pena  
12                   because he was the Chief of Medicine at Laredo General  
13                   Hospital. Virlar was asking for more business. And his  
14                   biggest complaint was Dr. Pena said to him unprompted,  
15                   allegedly, I'm not going to send anymore patients to  
16                   Merida because I'm not getting paid.

17                   Well, we know Merida wasn't paying Dr. Pena.  
18                   We have it in -- in black and white in the letter,  
19                   Rodney Mesquias Exhibit Number 1, they were behind, they  
20                   were not paying their medical directors, first of all.

21                   Second of all, where's the proof? Where's  
22                   the proof beyond a reasonable doubt that Dr. Pena did  
23                   that?

24                   Where's the proof that because he wasn't  
25                   getting paid Dr. Pena stopped sending patients to

1 Merida, or started withdrawing patients from Merida?

2 Again, if you have someone like Mr. Virlar  
3 telling you, do we accept it as gospel?

4 Should we accept it as gospel?

5 I think to convict somebody beyond a  
6 reasonable doubt we would need a little bit more, just a  
7 little bit more than the word of Jesus Virlar to say  
8 that this actually happened. That this rose to the  
9 level of a conspiracy to commit Medicare fraud.

10 Then, of course, there's Mr. Carrillo,  
11 Eduardo Carrillo. He said, well, I -- I may have signed  
12 some -- some -- some certifications for Francisca Perez,  
13 Count Three, but I don't remember what. Okay.

14 Well, let's talked about Francisca Perez. I  
15 know Mr. Canales talked about Francisca Perez, he showed  
16 you some documents, but for the record, I want just to  
17 talk about Ms. Perez and the medical conditions that she  
18 has. And this is in Exhibit E-20, it's bate-stamp  
19 240-449.

20 Hospice certification and plan of care.  
21 Principle diagnosis for Francisca Perez: Chronic  
22 respiratory failure. Cerebral thrombosis with  
23 infarction, unspecified essential hypertension,  
24 pertinent diagnoses. Functional limits: Ambulation,  
25 walking, bowel bladder incontinence, contracture.

1 Remember Mr. Canales talked about Francisca couldn't  
2 unclench her left-hand. Why? Because she had strokes.  
3 She had a history of strokes. Francisca was bedbound at  
4 the time she was put on hospice.

5           Activities permitted: Complete bedrest.  
6 During that certification period, the one in question  
7 that went from December 18th, 2013 to March 17, 2014,  
8 when Francisca Perez was recertified for hospice, the  
9 certification was she was going to die, if the diseases  
10 that she had ran their normal course over the next six  
11 months.

12           So what happened? Never heard of this from  
13 the Government, never heard it from Mr. Carrillo.  
14 Again, this is from E-20, 240-802.

15           Francisca Perez was sent to the emergency  
16 room on April 24th, 2014. She was in bad shape. She  
17 had a reversal in her -- in her condition. Now, this --  
18 her condition, she was bedridden. The left side of her  
19 body was paralyzed because of multiple strokes. Her  
20 left hand was clenched, she could not unclench it.

21           And it got worse. She got sent back to the  
22 hospital on this date. Past medical history includes  
23 that she's bedridden, that she has gastrostomy tube fed,  
24 her peg tube, she couldn't eat on her own, they had to  
25 feed her. A total care patient.

1           In the past she's had one or two strokes  
2     affecting the right frontal lobe and the right parietal  
3     lobe. That's why her left side was completely  
4     paralyzed. That's why she had those issues.

5           The patient has a history of dementia,  
6     vascular for Alzheimer's secondarily. Her stroke has  
7     rendered her with long standing left hemiparesis with  
8     particular affliction of the left hand which is very,  
9     very contracted.

10          Within six months of her being certified,  
11     this happened. And just, again, leaving that hospital  
12     her -- her diagnosis, new stroke, aspirational  
13     pneumonia, metabolic encephalopathy, hypertension,  
14     dementia, vascular and Alzheimer's both, cardiomyopathy,  
15     bedridden, total care, gastrostomy fed patient.

16          I know you saw this. Francisca Perez's  
17     condition was so dire they signed a DNR order for her  
18     two months later. And as you know from the part of  
19     closing that Mr. Canales talked about Francisca, her  
20     family was having issues coming to grips with the fact  
21     that she may die. She was being counseled, the family  
22     was being counseled over and over again about end of  
23     life, how DNR was necessary.

24          The fact of the matter is, ladies and  
25     gentlemen, there was no conspiracy to unnecessarily

1 place Francisca Perez on hospice, she -- she needed to  
2 be on hospice. She is alive today, God bless her, thank  
3 God. But that doesn't change the fact that for the  
4 certification period on Count Three Francisca Perez  
5 needed to be on hospice.

6 Another thing with regards to Carrillo and  
7 Virilar before I forget, I want to show you one last time  
8 because I know you'll miss it. Exhibits 3 -- L-2, the  
9 map, you've seen the map, the Government took great pain  
10 to put this map of Carrillo and Virilar and Pena all  
11 together. These are the medical directors in Texas.  
12 They want you to believe that Dr. Pena was the same as  
13 Virilar, the same as Carrillo, doing the exact same thing  
14 that Carrillo and Virilar were doing. That the medical  
15 records show they may have been doing, that their own  
16 testimony showed that they were doing.

17 But -- but did you hear any testimony that  
18 put Dr. Pena on that level? Did you see any evidence  
19 that put Dr. Pena on that level?

20 I mean, this morning Mr. Foster said, when  
21 he was talking about Dr. Pena, he mentioned Francisca  
22 Perez and other patients. Where are the other patients?  
23 Who are the other patients?

24 I asked Jose Aguilar, name those patients,  
25 all those patients that came off of hospice that were



1 part of this alleged kickback, who are they, where are  
2 they, what are their conditions now? The only patient  
3 you have even heard of from Dr. Pena is Francisca Perez.  
4 That's it. All these claims, all these millions billed,  
5 you've heard from one related to Dr. Pena. That's it.

6 And, again, Government Exhibit L-3, trying  
7 to show Dr. Pena on the same level as Carrillo and  
8 Virilar. You know better. You know that's not true.

9 There's another thing that kind of stood out  
10 to me while watching the Government's direct this  
11 morning, or excuse me, the Government's initial close,  
12 and that was their reliance on Jose Aguilar. You  
13 remember Jose. I believe Mr. Foster said that he was  
14 anguished as he stood here -- sat here and testified on  
15 the stand.

16 Anguished? Did you take Mr. Aguilar to be  
17 anguished? I certainly didn't. I took Mr. Aguilar to  
18 be someone who was scared. Not scared for the  
19 situation, not scared for people or individuals, he was  
20 scared because his schemes were coming undone.

21 Jose Aguilar was an informant for the FBI,  
22 brought into it by his business partner, co-owner and  
23 co-founder of Generous, Edgar Jimenez.

24 You heard the testimony, he always had a  
25 scheme, come and invest in my new hospice. He got

1 Dr. Pena to invest, he got Marco Karam to invest, he had  
2 cameras and all sorts of little things. Always looking  
3 for a scheme, always looking for an investment.

4 And you know what, ladies and gentlemen,  
5 he's asking you to invest as well. He's scheming with  
6 you, with the Government to have you believe his  
7 testimony.

8 This is a man who would go to someone he  
9 called in his own words his mentor and wear a camera to  
10 tape him, wear a camera to get him to say things that  
11 could be used against him in a court of law later on.

12 You know, the one thing that struck me about  
13 those tapes, and I apologize if I belabor the point,  
14 when I had Jose Aguilar up there was the fact that he  
15 paid cash, cash that was given to him by the  
16 United States Government in an attempt to bait Dr. Pena  
17 to do what he wanted him to do.

18 You remember the tapes. What was Dr. Pena's  
19 reaction? Oh, cash, you always pay me by check. The  
20 first installment of \$2,500 Dr. Pena said, you paid by  
21 check. The second installment of \$2,500, what did Ms.  
22 Pena say, we heard her, God bless her, we heard her over  
23 everybody else, otra vez, again? Because it wasn't  
24 cash. It was check.

25 And why was he paying? Because he owed,

1 ladies and gentlemen. He owed Dr. Pena money. Whether  
2 or not he paid back the loan, we argue that he didn't,  
3 but even if you believe that he did, he owed money for  
4 medical director services. He testified that he went  
5 two years without paying Dr. Pena for his medical  
6 directorship. Two years.

7 Jose Aguilar also testified that he entered  
8 into a contract with Dr. Pena at Generous starting in  
9 2014. Two years without paying medical services.

10 And then Jose comes in and he says, oh my  
11 gosh, Dr. Pena comes to me and he says you better pay me  
12 money once they start making money. Heck yeah. He did  
13 the work. He helped them start up that company from  
14 scratch. There's no such thing, ladies and gentlemen,  
15 as a free lunch. Dr. Pena earned that money  
16 legitimately to care for those hospice patients at  
17 Generous and Jose Aguilera still didn't want to pay him  
18 for that.

19 And again, I go back to it because it bears  
20 repeating, and it is critical, did those patients move?  
21 Nine patients, did they get transferred? We don't know.  
22 We don't know.

23 Oh, and before I forget, let's just add this  
24 to the tally board. Jose Aguilar also owed Dr. Pena  
25 \$7,000 for art, owed him money for lease. So when

1 Dr. Pena gets paid this money in cash, not check as --  
2 as they're supposed to, Dr. Pena didn't know what it was  
3 for. They want you to believe, yeah, it's a kickback.  
4 Where's the proof? Beyond a reasonable doubt, where's  
5 the proof?

6 I know they'll come back and they'll play  
7 the tapes, but ladies and gentlemen of the jury, you  
8 have those tapes, you can go back and listen to them if  
9 you want. They'll play you little snippets here and  
10 there, but you have those tapes.

11 And there's another person you did not hear  
12 from and that's Edgar Jimenez, the co-owner of Generous,  
13 the other individual who was an informant for the FBI.  
14 Jose Aguilar's running buddy, the two of them would wear  
15 that wire and go into Dr. Pena's offices. Why didn't we  
16 hear from him?

17 I think it's really critical that we didn't  
18 hear from Edgar Jimenez because he was the one who was  
19 taping Dr. Pena on October 30th, 2017, the alleged  
20 attempt to obstruct justice. We didn't hear from Edgar  
21 because, oh, by the way, on those tapes, the alleged  
22 attempt to obstruct justice the Government told you  
23 Dr. Pena wanted to back-date a contract. Who brought  
24 that contract to the meeting? Edgar Jimenez. Edgar  
25 brought it.

1                   And you know why he brought it? Because he  
2     told Dr. Pena, I lost it. Didn't hear about that; did  
3     we?

4                   And at the end of the day, that contract was  
5     for services that nobody disputes were actually  
6     rendered. And when Dr. Pena tells Edgar Jimenez, oh we  
7     need to find who it did this, where is this coming from?  
8     Did he tell him to lie, did he tell him to make stuff  
9     up? He's just wondering, concerned who's coming after  
10    me, where's this coming from? If Jimenez was being  
11    honest with him, he would tell him it's the FBI. But  
12    did he? You didn't hear the tapes.

13                  And speaking of the FBI, let's talk about  
14    Mr. -- Mr. Williams, Special Agent Neal Williams. He  
15    got up there on the stand and he told you, this was the  
16    first health care investigation that he started running  
17    with in toto, the full, from the beginning. I don't  
18    think there's any dispute this was an incomplete  
19    investigation.

20                  Neal Williams had these individuals wearing  
21    wires, going in there with cameras, that's all he did.  
22    He had those tapes, he went in there on October 27th,  
23    2017 armed with a target letter. Defendant Exhibit 27.  
24    When he walked into Dr. Pena's office on October 27th,  
25    2017 Neal Williams had this letter at the ready.

1                   Waited until Dr. Pena talked to him before  
2                   he gave him this letter. At no point did he say,  
3                   Dr. Pena, you are a target of a Grand Jury  
4                   investigation. At no point did he tell Dr. Pena before  
5                   the interview started, if you don't participate or  
6                   cooperate with me, you will be indicted by a Grand Jury.  
7                   At no point did he recommend to Dr. Pena that his  
8                   attorney be present. Why? Just a friendly  
9                   conversation. No big deal, right? Wrong.

10                  Agent Williams told you exactly what he was  
11                  doing in that conference room, exactly what he was doing  
12                  in that office that day, and exactly what he wanted from  
13                  Dr. Pena when he walked into that office.

14                  He wanted cooperation. He wanted to put  
15                  the screws on Dr. Pena so that Dr. Pena would become the  
16                  next Virlar or Carrillo and testify against Rodney  
17                  Mesquias and Henry McInnis. That's what it was all  
18                  about.

19                  So why tell somebody that you're under  
20                  investigation? Why tell somebody that if you don't  
21                  cooperate you're going to go the Grand Jury?

22                  And -- and here's the killer part. I asked  
23                  Agent Williams on the stand, at any point in your  
24                  investigation did you tell Dr. Pena that you had him on  
25                  tape allegedly conspiring to take a kickback? Did you

1 tell him that Jose Aguilar and Edgar Jimenez had him on  
2 tape?

3 Remember what his answer was? Um, no.  
4 We -- we don't do that. Really? Because you know who  
5 got that basic courtesy to get cooperation? Jesus  
6 Virlar.

7 Remember that testimony? When FBI agents  
8 raided Jesus Virlar's house, knocked on his door, they  
9 said, we want you to cooperate. He says, no, I'd rather  
10 have my attorney. Well, before we do that, hold on,  
11 let's put a pin on that. Before we do that, let's  
12 listen to these tapes, just listen. All you've got to  
13 do is listen. Virlar got that courtesy that my client  
14 did not. And the reason why? Because they wanted to  
15 set up Dr. Pena, they wanted him to cooperate, they  
16 wanted him to testify.

17 And because he didn't cooperate, because he  
18 didn't testify, here we are.

19 The Government, through Agent Williams is  
20 saying, well, Dr. Pena lied. False statement to a  
21 federal agent. Dr. Pena lied. I have the list of all  
22 the alleged lies that Dr. Pena told, allegedly according  
23 to Mr. Foster from this morning.

24 Number one, Dr. Pena took kickbacks for  
25 referrals. Now, remember to convict Dr. Pena of that,

1 he has to show that he knowingly and willfully uttered a  
2 false statement to the FBI.

3 Did Agent Williams ever say, Dr. Pena, did  
4 you take a kickback from Generous, or Dr. Pena did --  
5 did you take a kickback from Merida? That wasn't his  
6 question. Just general, did you ever take a kickback?

7 Did Dr. Pena intentionally lie to him,  
8 knowingly and willfully tell a false statement? No. If  
9 you're referring to whatever payments that Jose Aguilar  
10 gave him, Edgar Jimenez, Dr. Pena didn't consider that a  
11 kickback, that was -- that was payment for monies that  
12 were owed. Was Dr. Pena taking a kickback when he  
13 received money from Merida? No, money that he was owed.

14 But that rises to the level of knowingly and  
15 willfully uttering a false statement to a federal agent?  
16 Absolutely not.

17 So then we'll go to the second one, the  
18 second false statement that they played the tapes again  
19 a little snippets with Agent Williams was that Dr. Pena  
20 was getting payment for putting people on hospice who  
21 weren't eligible.

22 And what was the reference, who was the  
23 patient that Mr. Foster referred to when he said that?  
24 Francisca Perez. And we talked about her. And this is  
25 where I got the part where he says and other patients



1     you've heard about. Other than Francisca Perez, what  
2     other patients did you hear about relating to Dr. Pena?

3                 So then the next false statement is  
4     Dr. Pena's statement about keeping people alive on  
5     hospice. And we talked about this. We've talked about  
6     this with Agent Williams, we talked about this with  
7     everybody else. Hospice care is comfort care,  
8     palliative care. That doesn't mean that in taking  
9     someone on hospice you have to take any steps, medically  
10    or otherwise, to end their life. You give them medical  
11    care. It's not curative care, you're not curing  
12    their -- their underlying diseases, but you're making  
13    them comfortable.

14                So if someone can't swallow, if someone  
15    can't feed themselves, you do give them a peg tube, you  
16    give them water. And absent any order out there by a  
17    family member, or someone capable of issuing that order,  
18    you have to do it. A doctor is bound to do it, legally  
19    and ethically a doctor is bound to do it.

20                And we talked about, when I asked Agent  
21    Williams and I asked other individuals, do you know the  
22    2017 law that Governor Abbott signed into law in Texas  
23    that requires doctors to give a patient food and water?  
24    That's the law, folks. And Dr. Pena, when they talk  
25    about, oh, I don't believe the six months. Yeah,

1 Dr. Pena admits it, it's on the tapes. He doesn't  
2 believe that hospice is limited to six months or die.

3 You know why? Because that's not the  
4 standard. That is not the standard for hospice. I  
5 figure at this point, I'm sure you guys are now hospice  
6 experts and you're probably tired of us on the Defense  
7 telling you this, but the standard is six months or less  
8 to live if the disease runs its normal course. But  
9 there are outliers.

10 Laurie McMillan didn't even know that 12 to  
11 15 percent of people on hospice live longer than six  
12 months. It can happen.

13 And Dr. Pena told Agent Williams, I don't  
14 believe in taking any steps that would shorten  
15 somebody's life. And, oh, by the way, as the Government  
16 sits here and says, Dr. Pena keeps people alive for as  
17 long as possible. Where's the evidence? Where's the  
18 medical proof to show that he took steps to  
19 unnecessarily extend lives? Unnecessarily extend lives,  
20 where is the evidence, show me that beyond a reasonable  
21 doubt. It's not there.

22 And don't even think that Jose Aguilar's  
23 testimony about a peg tube counts. Again, unspecified,  
24 no specifics, no details. And he -- he -- Jose kind of  
25 covered that up by saying, oh, well, you know, it was --

1 he was just being arrogant. Maybe. I'm not disputing  
2 it. We've seen the tapes, but was it medically  
3 necessary? Was it helping someone who needed help?  
4 Were there medical orders to the contrary that Dr. Pena  
5 was blatantly ignoring by putting whatever Jose Aguilar  
6 was recounting? Was that -- was that true? I -- you  
7 know, and then the -- the best part about that whole  
8 subject when I talked to Jose was he goes, well, he did  
9 that so he could make money. Dr. Pena did that so he  
10 could make more money. Really?

11 Where was the evidence to show that he was  
12 making more money by putting people on peg tubes? Where  
13 was the evidence of a kickback giving his way other than  
14 the medical directorship that he was being paid?

15 In fact, the one person who was making more  
16 money as a result of that action, who was it? Jose  
17 Aguilar, Generous. He didn't want to answer that  
18 question to me. He said, well, Generous makes money. I  
19 go, yes, but who is Generous? Well, I don't know. Sir,  
20 you own 60 percent, you are Generous. If that's what  
21 you're arguing, you're making the money, not him.

22 Generous was in bad shape, you know that.  
23 That was the whole reason why Jose Aguilar and -- and  
24 Edgar Jimenez were doing what they were doing, going to  
25 the FBI and testifying. \$200,000 plus in tax liens,

1       couldn't make payroll. I don't think so.

2               We can't believe Jose Aguilar and we surely  
3       can't believe Edgar Jimenez.

4               We've talked a little bit, you've heard the  
5       other attorneys talk about the Government experts,  
6       Laurie McMillan, Michael Petron.

7               Laurie McMillan. Remember her? Remember  
8       her testimony? She works for a company Qlarant. Her  
9       company had an \$87,000,000 contract over two years with  
10      the United States Government to go out and find fraud.  
11      That's her job. Her job, find fraud, that's it.

12              And, you know, what did she say if she  
13      doesn't find fraud? Control her company. But even more  
14      galling than that, like I get it, she has a job, we all  
15      have jobs, even more galling than that is her analysis.  
16      When she comes in and talks about all the claims that  
17      she reviewed, at no point did Laurie McMillan, who is a  
18      nurse by the way, conduct any sort of medical  
19      examination, any sort of medical review at all to  
20      determine the validity of those claims. In fact, all  
21      she did was say, oh, man, this claim goes over six  
22      months, fraud. That's it. Those are her standing  
23      orders.

24              And I asked her, do you have any leeway, any  
25      variance, can we go and -- and say well, you know what,

1 maybe let's look at this study, or look at this journal?  
2 No. No. If I see it over six months, it goes in the  
3 fraud column. That's it.

4           So Laurie McMillan did say something good,  
5 as Mr. Canales talked about. Laurie McMillan talked  
6 about the safe harbor provision, how it is okay to have  
7 these medical directorships, Laurie McMillan said it is  
8 okay for a doctor who's a medical director to refer  
9 patients to the hospice. There's nothing wrong with  
10 that. Absolutely nothing wrong with that. That's the  
11 law, ladies and gentlemen.

12           Laurie McMillan said you can have an  
13 unlimited number of hospice recertifications provided  
14 the patient qualifies. Nothing wrong with that.

15           And then Michael Petron, the million-dollar  
16 man. Again, from October 2017 to today, two years, he's  
17 billed the Government \$250,000. He takes issue with  
18 Dr. Pena making \$108,000 over five years. Think about  
19 that. There's something wrong with this picture.

20           And as Mr. Canales said, he had all the  
21 tools to do a statistical analysis. He could have told  
22 you how many of those claims at Merida were fraudulent.  
23 He was never asked and he never offered.

24           I'm just going to create a heat map, maybe  
25 make some tabulations and that's it. Broad, general

1 strokes.

2 I told you I would talk about the videos,  
3 and I want to go back to them, you know. And I -- when  
4 we started opening, I told you there's going to be  
5 things in that video, those videos, I didn't like, that  
6 I personally disagreed with, maybe behaviors or  
7 attitudes that I found offensive. Nothing has changed.  
8 Nothing over those two weeks has changed my mind.

9 But do those videos show what the Government  
10 purports them to show?

11 Do those videos show evidence of kickbacks?

12 Do they show Dr. Pena taking bribes?

13 Do they show Dr. Pena lying to federal  
14 agents or obstructing justice? Beyond a reasonable  
15 doubt? I don't think so.

16 Now, the Government likes to take little  
17 snippets out and play it, and I'm sure the minute I sit  
18 down they'll play more snippets, and you know what, if  
19 Judge Olvera gave them the time, they'd probably show  
20 the tapes back to back to back to back again.

21 They are what they are. However, those  
22 tapes, the comments within those tapes, the way you make  
23 money is by keeping them alive as long as possible.  
24 Again, we asked the witnesses on the stand, it's a true  
25 statement. Is it course, absolutely vulgar? Probably.

1 Do I agree with it? No. But is it a true statement?

2 If someone who is in the hospital or in a  
3 hospice for two days going to make money for whatever  
4 company, more or less than someone who's on hospice for  
5 two months? More or less than someone who's in the  
6 hospital for two months?

7 I think I used the term it's simple  
8 economic. Well, yeah, I think it is. If anybody's had  
9 any interaction with the medical field, I mean, you  
10 know.

11 I don't agree with his statement, like I  
12 said, I'd probably find it vulgar, but does it rise to  
13 the level of a crime?

14 Does it rise to the level of a crime beyond  
15 a reasonable doubt?

16 And more importantly, is there evidence to  
17 show that he kept people on hospice long enough, longer  
18 than is necessary medically simply for the purposes of  
19 making money? You know, that's the biggest thing that's  
20 missing throughout this entire case.

21 Where's the review, where's the medical  
22 review of the patients, where's the medical review of  
23 the files to show that wasn't necessary, that was  
24 improper, you did that strictly for money? Where?

25 I don't have that burden, none of the

1 Defendants have that burden, that burden rests with the  
2 Government and they have to do it beyond a reasonable  
3 doubt.

4 Have they done it? No, they surely have  
5 not.

6 Now, briefly, ladies and gentlemen I just  
7 want to go through the jury charge just so we're clear  
8 on what you are being asked to do in this case, and  
9 particularly with Dr. Pena.

10 This is Count One, Instructions for  
11 Conspiracy to Commit Health Care Fraud.

12 This is what they have to prove that  
13 Dr. Pena did beyond a reasonable doubt, every single one  
14 of these things. And as you've been instructed by the  
15 Judge, as you've been instructed by the other attorneys,  
16 if they cannot prove every single one of these items  
17 beyond a reasonable doubt, you must, must find Dr. Pena  
18 not guilty.

19 The Defendant, and at least one other person  
20 made an agreement to commit the crime of health care  
21 fraud? The Defendant knew of the unlawful purpose of  
22 this agreement? The Defendant joined in the agreement  
23 willfully? Again, where's the evidence? Where's the  
24 proof beyond a reasonable doubt that Dr. Pena is guilty  
25 on Count One? It's not there. It doesn't exist.



1 Count Three. We've heard talk of the  
2 substantive counts Two through Seven.

3 Count Three, Francisca Perez, the only one  
4 that pertains to Dr. Pena. Here are the elements.  
5 Dr. Pena knowingly and willfully executed a scheme or  
6 artifice to defraud Medicare by the means of false or  
7 fraudulent pretenses, representations, or promises in  
8 connection with its delivery of or payment for health  
9 care benefits, items, and services. Beyond a reasonable  
10 doubt for Francisca Pena? Absolutely not. You know  
11 that.

12 And, if you get past number one, let's go to  
13 number two. The Defendant acted with specific intent to  
14 defraud Medicare? Beyond a reasonable doubt on  
15 Francisca Perez? Absolutely not.

16 But even if you get past one and two, the  
17 false and fraudulent representations the Defendant used  
18 were material and the operation of the health care  
19 benefit program affected interstate commerce.

20 They can't even get there. One and two is  
21 the critical part and they fail. They haven't proven  
22 that beyond a reasonable doubt, ladies and gentlemen.  
23 You know that.

24 THE COURT: You have 30 minutes, Mr. Guerra.

25 MR. GUERRA: Thank you, Your Honor.

1 Conspiracy to Commit Money Laundering. This is Count  
2 Eight. Because he got paid? I mean, is he laundering  
3 money to take benefits? I -- I haven't seen it. I  
4 don't think it's there and it's not done beyond a  
5 reasonable doubt.

6 Again, for Count Eight you must find  
7 Dr. Pena not guilty.

8 Count Nine, Obstruction of Criminal  
9 Investigations of the Health Care Offenses.

10 And this is what we've talked about, and  
11 here's what you have to find. The Defendant prevented  
12 obstructed, misled, delayed or attempted to prevent,  
13 obstruct, mislead or delay the communication of  
14 information or records relating to a violation of a  
15 federal health care offense to a criminal investigator  
16 and the Defendant did so willfully.

17 Where's the evidence? Where is the evidence  
18 beyond a reasonable doubt that he did that?

19 Now, they'll say, well, October 30th, 2017  
20 he got ahold of Edgar Jimenez and he told Edgar Jimenez,  
21 we need to talk; that he told Edgar Jimenez, we need to  
22 get to the bottom of this. They had it on their power  
23 point this morning.

24 But is that what this count actually  
25 requires?

1           Did you find any evidence that Dr. Pena  
2 prevented, obstructed, misled, delayed or even attempted  
3 to do any that of the communication of communication or  
4 records relating to a violation of a health care claim?

5           Did you see that?

6           Did you hear that?

7           Did the Government provide you that  
8 evidence? And if they did, did they prove this beyond a  
9 reasonable doubt? Absolutely not.

10           Hesitation is reasonable doubt. They don't  
11 get there.

12           Count Ten, False Statement. And we've  
13 talked about that. We've talked about everything that  
14 happened with Agent Williams over and over again.

15           The Government cannot meet its burden there  
16 on Count Ten, ladies and gentlemen.

17           And here's the last one, Conspiracy to Pay  
18 and Receive Health Care Kickbacks.

19           Mr. Canales talked about it, safe harbor  
20 provision. And let's talk about, it's in the jury  
21 Instructions. The agency agreement is set out in  
22 writing and signed by the parties. The agency agreement  
23 covers all of the services the agent provides to the  
24 principal for the term of the agreement and specifies  
25 the services to be provided. The term of the agreement

1 is for not less than one year. The aggregate  
2 compensation is consistent with fair market value and  
3 arms-length transaction.

4           You've heard the testimony. Even Virlar  
5 talked about what the going rate was for a medical  
6 director. These agreements that Dr. Pena had with the  
7 Merida Group fall within the safe harbor provision. And  
8 for that very reason, you cannot find that he conspired  
9 with Rodney Mesquias to violate the Anti-Kickback  
10 Statute.

11           Ladies and gentlemen, you were asked by  
12 Mr. Foster at the end of closing to be the voice, be the  
13 voice for these patients. And the Government may even  
14 ask you to send a message by your verdict.

15           We're asking you to send a message as well.  
16 We're asking you to send a message on behalf of the  
17 residents of the Southern District of Texas that you  
18 will not tolerate Medicare fraud, that you will stand up  
19 to it and root it out where you find it, but you are  
20 also sending a message to the federal government that  
21 anybody accused of a crime in the Southern District of  
22 Texas must have their guilt proven beyond a reasonable  
23 doubt.

24           The message you're sending to the Department  
25 of Justice is that you must prove every element of every

1 single count against someone convicted of a crime, or  
2 someone accused of a crime beyond a reasonable doubt.

3 That is the message we're asking you to  
4 send, ladies and gentlemen, by finding Francisco Perez  
5 not guilty on all counts.

6 We appreciate your time, we appreciate your  
7 consideration, God bless you.

8 THE COURT: Thank you, Mr. Guerra. Ladies  
9 and gentlemen, let's go ahead and take a very brief  
10 recess before we resume.

11 COURT OFFICER: All rise for the jury.

12 (JURY OUT.)

13 THE COURT: Thank you, everyone. Please be  
14 seated. We'll be in recess.

15 (COURT IN SHORT RECESS.)

16 (JURY IN.)

17 THE COURT: Thank you, everyone. Please be  
18 seated.

19 Mr. Lowell, are you ready to proceed, sir?

20 MR. LOWELL: Yes, Your Honor.

21 THE COURT: Please proceed.

22 MR. LOWELL: Thank you.

23 Good afternoon, ladies and gentlemen. We're  
24 getting to the end. At the outset, I want to clear all  
25 that smoke that these Defense attorneys were blowing

1 over this courtroom. They were blowing smoke all over  
2 this courtroom trying to trick, trying to deceive you,  
3 fool you, like the Defendants fooled that Grand Jury,  
4 like the Defendants fooled Medicare, pocketing  
5 \$120,000,000, stealing that money, trying to trick,  
6 deceive and fool you like they deceived those patients  
7 telling the patients they needed their last rites,  
8 telling their patients they were about to die. Not  
9 going to happen. Not going to happen with this jury.  
10 None of you is going to be tricked.

11 Now, the Government's burden never shifts.  
12 We have the burden. But that doesn't mean, ladies and  
13 gentlemen, that you have to ignore what these Defense  
14 attorneys, these same Defense attorneys that talked to  
15 you two weeks ago during their opening statement. They  
16 said certain things during that opening statement. Two  
17 weeks ago was a long time ago, but I'm going to remind  
18 you because they just talked for about three hours today  
19 and you should remember what they told you two weeks  
20 ago.

21 We got a record and we got a transcript.  
22 Let's go to slide one, please. Slide one, Defense  
23 Counsel for Rodney Mesquias. He told you Dr. Vincent  
24 Gonzaba from San Antonio, you're going to hear from  
25 Dr. Gonzaba. Dr. Gonzaba's not part of any fraud. He

1 stands by his clinical judgment.

2 MR. HECTOR CANALES: Judge, I'm going to  
3 object to this. This is shifting the burden, this is  
4 totally improper argument on -- on the -- on part of Mr.  
5 Lowell, and he knows it.

6 He's obviously angry, but, you know, this is  
7 wrong, Judge.

8 MR. LOWELL: Totally fair. It's opening  
9 statement.

10 MR. HECTOR CANALES: Judge -- it violates  
11 your order, and they did hear from Mr. Gonzaba. He  
12 testified in the records, this is a completely improper  
13 and he knows it.

14 THE COURT: Gentlemen, gentlemen, your  
15 objection is overruled, Mr. Canales.

16 Please proceed.

17 Ladies and gentlemen, this is closing  
18 arguments. Each side is entitled to give their opinion.

19 MR. LOWELL: May I proceed, Your Honor?

20 THE COURT: According to what the facts have  
21 shown.

22 MR. LOWELL: Thank you, Your Honor.

23 Where's Dr. Gonzaba? He didn't testify in  
24 this case. Next slide.

25 Mr. Canales said in opening statement, and

1 he said it again today, Rodney Mesquias didn't sign a  
2 single, didn't certify a single person, didn't provide a  
3 single, didn't interview a patient, didn't assess a  
4 patient, he did not assess any of those patients, any of  
5 the six patients for which the doctors relied upon.

6 That wasn't true. He said this again today.

7 Next slide. Here it is right here. Start  
8 of care for Dr. -- for Jack High, patient Jack High is  
9 one of the substantive counts, he's Count Two. Right  
10 there. Rodney Mesquias, registered nurse. He's  
11 signing, part of the certification for this specific  
12 patient. Right under him is his good buddy, his own  
13 best friend Dr. Virilar. So that wasn't true.

14 Next slide. Mr. Canales also told you about  
15 these 27 nurses, these 14 doctors in addition to  
16 Dr. Virilar, Dr. Carrillo. Where are they? Where are  
17 they, ladies and gentlemen?

18 Next slide.

19 MR. HECTOR CANALES: Judge, I'm going to  
20 object again. That is completely -- that is  
21 objectionable, he's shifting the burden. He can't do  
22 that. You don't have to call anybody. The Government  
23 -- it's the United States Government, they've got all  
24 the power in the world to call people. It's their case.

25 THE COURT: Mr. Canales, the objection is



1 overruled. The Court's charge is quite clear the burden  
2 never shifts to the Defense.

3 Please proceed.

4 MR. LOWELL: This is a document and he kept  
5 going. This is a document that Mr. Canales showed you  
6 just today and he focused on the right side of this  
7 document. This is the certification for Jack High. And  
8 he focused on Dr. Greg Gonzaba. He forgot to show you  
9 who signed right next to Dr. Gonzaba, Dr. Virlar, Rodney  
10 Mesquias's best friend.

11 Why didn't Mr. -- why did Mr. Canales cover  
12 this up? Why didn't he show you the whole document?

13 Next slide. We also heard about  
14 Dr. Gonzalez, Dr. Gabriel Gonzalez, if you recall  
15 Dr. Gonzalez came into the courtroom, he testified about  
16 his patient Petra Cerda. He was a good, honest doctor.  
17 You saw him, he's from right here in the Valley. He  
18 took the stand, he knows this patient Petra Cerda, and  
19 he testified that he signed this document and he very  
20 clearly stated at the top of this document evaluate and  
21 treat.

22 That's not certify the patient for hospice  
23 as Mr. Canales suggested to you today. It's evaluate  
24 and treat.

25 And what happened to Ms. Cerda? You heard

1 the testimony from Dr. Gonzalez. Ms. Cerda was hijacked  
2 like the other patients in this case by the Merida Group  
3 without his knowledge.

4 Let's go to Henry -- let's go to Henry  
5 McInnis, counsel for Mr. McInnis.

6 Again, two weeks ago he gave an opening  
7 statement and he represented to you that Mr. McInnis  
8 said "get all the records. We need to comply with the  
9 Grand Jury subpoena". We need to comply with the Grand  
10 Jury subpoena.

11 That's not what Mr. McInnis did.

12 MR. CYGANIEWICZ: Objection, Your Honor.  
13 Again, that's improper attempt to shift the burden to  
14 try to show the jury that we didn't call witnesses which  
15 is our absolute right. Dr. Virlar even testified that  
16 Mr. -- Mr. McInnis was trying to comply.

17 Improper argument. It's an attempt to shift  
18 the burden of proof, Your Honor.

19 THE COURT: The objection is overruled.  
20 Please proceed.

21 MR. LOWELL: Thank you, Your Honor.

22 The testimony was crystal clear. Roland  
23 Aguilera testified that the direction of Henry McInnis,  
24 sitting right over there at that table, he and  
25 Dr. Virlar manufactured false records. That's not

1 compliance.

2 MR. CYGANIEWICZ: Objection, Your Honor.  
3 That's a mis -- misstatement of the evidence,  
4 Your Honor. There's nothing to that effect in the  
5 record.

6 THE COURT: The -- the objection is  
7 overruled.

8 Please proceed.

9 MR. LOWELL: Next slide.

10 Mr. Pena's counsel fared no better. He just  
11 finished, talked to you for about roughly an hour. Also  
12 talked to you two weeks ago.

13 We have the transcript right here. And what  
14 counsel said to you two weeks ago was that Mr. Pena had  
15 nothing to do with home health. That was completely  
16 wrong.

17 Next slide. Mr. Pena, direct evidence, hard  
18 data showing Dr. Pena involved with 33 patients for the  
19 Merida Group for the home health company of the Merida  
20 Group.

21 These examples are key, ladies and  
22 gentlemen.

23 If we could switch to the ELMO, please.

24 So we had the home health patients from two  
25 weeks ago where he said no evidence of Mr. Pena's

1 involvement in home health, and then we had counsel say  
2 today, counsel for Mr. Pena, that there was no direct  
3 evidence of Mr. Pena discharging a patient, taking a  
4 patient back. It's right here. It's right here, ladies  
5 and gentlemen. Discharge patient from Merida Hospice,  
6 patient to transfer to CIMA Hospice.

7 Top of the page, this is Francisca Perez.  
8 Second page of the document, Dr. Francisca -- Francisco  
9 Pena.

10 Completely contradicted by evidence, direct  
11 evidence. Can you trust their message?

12 Let's jump to slide eight. If you have  
13 kids, you've heard this before, blame it on everybody  
14 else, right? Every single one of these Defense  
15 attorneys got up and they blamed everybody else. He did  
16 it, she did it, somebody else did it.

17 All of these witnesses, they're all lying,  
18 they're all making it up. They all got together and  
19 said we're going to get Dr. Pena, Rodney Mesquias and  
20 Henry McInnis. It's ridiculous. It's ridiculous,  
21 ladies and gentlemen, that all of these witnesses,  
22 they're part of their own conspiracy, conspiracy to take  
23 them out. It doesn't mean make any sense. These folks  
24 are from different towns, some of them don't even know  
25 each other, and yet they all sat around a table and said

1 we're going to take out these Defendants.

2           Their testimony was consistent, it was  
3 clear. At the direction of Rodney Mesquias and Henry  
4 McInnis they falsified doctor's orders. At the  
5 direction of Rodney Mesquias and Henry McInnis they  
6 signed up patients who didn't qualify. And Dr. Pena  
7 demanded, commanded kickbacks for his patients.

8           That's clear from the tapes.

9           Dr. Pena's convicted based on those tapes,  
10 ladies and gentlemen. He didn't know he was being  
11 recorded. That's the real Dr. Pena on those tapes.

12           Slide nine. Spent a lot of time attacking  
13 Dr. Virlar and Dr. Carrillo. Let's take them out of the  
14 equation. Let's just imagine we take their testimony  
15 and we throw it in the trash. Remember, Dr. Carrillo  
16 and Dr. Virlar, they're friends. Imagine you don't have  
17 that testimony. You still have all these other  
18 witnesses that describe the fraud, that describe the  
19 fraud, ladies and gentlemen.

20           But of course, you don't need to throw away  
21 their testimony because the parts of their testimony  
22 relevant to this case, the fraud, the exploitation of  
23 patients, the payment for patients, was consistent.  
24 They're all saying the same thing. It's a broken  
25 record.

1                   Let's go to slide 12, please.

2                   This whole idea of cherry picking, cherry  
3                   picking patients, ridiculous. Dr. Carrillo you'll  
4                   recall confirmed, not six patients, 147 patients. Is  
5                   that cherry picking? He confirmed he signed fraudulent  
6                   orders for them, 147 in Laredo, San Antonio and the  
7                   Valley.

8                   Next slide.

9                   Dr. Virlar, cherry picking? 833 patients  
10                  across Texas. He admitted, I signed fraudulent orders  
11                  for them. Why is he going to lie about that?  
12                  Dr. Virlar is their doctor. He was their number one  
13                  doctor. They chose Dr. Virlar, not the Government.

14                  Next slide.

15                  Again, on this whole idea of cherry picking,  
16                  you take Dr. Virlar, Dr. Pena, Dr. Carrillo, we have  
17                  directing you to the bottom of the page here, we have  
18                  over 5,000 separate bills sent to Medicare based on  
19                  these three doctors. Immediately next to that, we have  
20                  over 1,000 patients connected to Dr. Pena, Dr. Virlar  
21                  and Dr. Carrillo. Cherry picking, six patients?

22                  Go to slide 16, please.

23                  Ladies and gentlemen, Henry McInnis was the  
24                  number two at this company. You heard from nurses that  
25                  he directed the falsification of records. Of course

1 Mr. McInnis is not admitting patients, he's an  
2 administrator, he's not a doctor, he's not a nurse, but  
3 he got other people to do his dirty work. He directed  
4 other people to commit the fraud. He pressured them.

5 His counsel today said there's no example of  
6 a nurse getting fired. There's Dorothy Watts, she was a  
7 registered nurse, you heard about her.

8 MR. CYGANIEWICZ: Judge, she did not  
9 testify.

10 THE COURT: Clarify the statement.

11 MR. LOWELL: You heard about a nurse. She  
12 didn't testify, but you heard about her in the  
13 testimony. She was terminated because she didn't go  
14 along with the fraud. Henry McInnis terminated her.  
15 That's an example.

16 As the number two, he worked right with  
17 Rodney Mesquias creating that intense pressure on others  
18 to go along with the fraud. You saw the nurses on the  
19 stand, the pressure they were under, the pain they felt  
20 to go along with this fraud. That pressure is coming  
21 right from Mr. McInnis and Mr. Mesquias.

22 Next slide, please.

23 Mr. McInnis made \$500,000 during this  
24 scheme. His co-conspirator Joe Garza living on the  
25 couch, sister's house, he made far less, only made

1 258,000. Joe Garza told you about Mr. McInnis'  
2 directives to further this scheme.

3 Next slide.

4 Rodney Mesquias, he's at the top. Witness  
5 after witness after witness testified about  
6 Mr. Mesquias. Don't fuck with my patients. Don't fuck  
7 with my money. Who says that? What legitimate, honest  
8 business owner who's -- who's running a legitimate  
9 company says that? Mr. Mesquias, like Mr. McInnis  
10 directed others to do his dirty work. Directed others  
11 to falsify records. Fired people who didn't go along  
12 with the fraud.

13 Next slide.

14 Last but not least, Mr. Pena. You've heard  
15 him on the tapes, you've heard about him on the  
16 evidence. You've gotten this inside look into this  
17 world, this world of health care fraud. We took you  
18 right into Mr. Pena's clinic. You heard how he views  
19 patients. Not from the Government, you heard directly  
20 from his mouth how he treats patients, what he thinks  
21 about them, how he uses them.

22 And by the way, this whole idea of a Texas  
23 law prohibiting Mr. Pena from doing certain things, you  
24 heard those tapes. Did Mr. Pena once talk about a Texas  
25 law? He talked about money as his motivation for



1 keeping patients alive. That was crystal clear.

2 Next slide.

3 Again, hard data, evidence, confirming  
4 Mr. Pena's ties, his conspiracy with Mr. McInnis and  
5 Mr. Mesquias. It's right here on these numbers. 2012  
6 to 2017 you have at least four Merida Group companies,  
7 123 patients, not one, not one patient, 123. You have a  
8 nearly 1,000 separate bills that the Merida Group sent  
9 to Medicare where Dr. Pena was the doctor. It's not one  
10 patient, ladies and gentlemen.

11 Next slide.

12 Counsel today also talked about this loan,  
13 this idea of a loan, this idea of artwork. Again, in  
14 the recordings not a single mention by Mr. Pena of  
15 needing a repayment on artwork. Not once did he talk  
16 about artwork.

17 And then we have these checks, loan  
18 repayment. This is before the source gives the cash to  
19 Mr. Pena. By this point, that \$21,000 loan, this is May  
20 and July of 2016, it had already been paid back. There  
21 was no confusion on Mr. Pena's part.

22 Next slide, please.

23 THE COURT: You have, approximately, five  
24 minutes.

25 MR. LOWELL: And just to drive that point

1 home further, Mr. Pena multiple times, this is July of  
2 2017, again, before the cash kickbacks were paid, I even  
3 loaned the \$20,000, they finally paid me.

4 Next slide.

5 They -- again, same recording, July 2017  
6 they paid \$20,000.

7 Next slide.

8 Besides my \$20,000, I've gotten at least  
9 18,000 more so I'm not hurting.

10 This man's already been paid.

11 Ladies and gentlemen, this case is about  
12 more than just lies and fraud. It's about truth. Truth  
13 is the only thing that matters in this courtroom and  
14 that's why I started with that opening statement.  
15 That's why I went through what they told you and what  
16 was truth, what is truth. It's also about justice.  
17 It's about justice.

18 You're here today, you can deliver that  
19 justice on behalf of the patients who were manipulated,  
20 on behalf of Medicare, that \$124,000,000 that was  
21 deposited into the bank accounts of the Merida Group.  
22 You can deliver justice on that.

23 You can deliver justice for all those  
24 patients, those nameless patients, a lot of them we  
25 don't even know their names, we don't their names, but

1 you heard their stories. You heard about them, they  
2 spoke through that evidence.

3 You heard about how they were exploited,  
4 their religious beliefs exploited at this most  
5 vulnerable period of their life. You have the  
6 opportunity to deliver justice to those patients.

7 Ladies and gentlemen, on behalf of the  
8 Government, on behalf of the patients who were lied to  
9 in this case, on behalf of the Medicare money that was  
10 stolen, on behalf of everyone who was lied to, we would  
11 ask that you deliver justice to Henry McInnis, convict  
12 Henry McInnis for his involvement in this scheme; we  
13 would ask that you deliver justice to Rodney Mesquias  
14 for leading this scheme, tricking patients, tricking  
15 that Grand Jury, those grand jurors; and we'd ask that  
16 you deliver justice to Dr. Pena exploiting patients, the  
17 most vulnerable time of their life, extending each and  
18 everyday, every gasp of breath for this man is another  
19 dollar. It's disgraceful.

20 Members of the jury, thank you.

21 Thank you, Your Honor.

22 THE COURT: Thank you, Mr. Lowell.

23 Ladies and gentlemen, again, I must  
24 reiterate that nothing you've heard from any of the  
25 attorneys is either testimony nor evidence. Once again,

1 it is their opinion and advocacy with respect to their  
2 respective clients.

3 I do have some further Instructions I need  
4 to read to you before you -- you commence your  
5 deliberations, I should say. Please listen carefully.

6 It won't be anywhere near as long as before,  
7 but please listen carefully.

8 This section is entitled, Roman Numeral  
9 Number Four, Instructions Regarding Deliberations.

10 To reach a verdict, whether it is guilty or  
11 not guilty, all of you must agree. In other words, your  
12 verdict must be unanimous on each count of the -- on --  
13 excuse me. Must be unanimous on each count of the  
14 indictment. Your deliberations will be secret, and you  
15 will never have to explain your verdict to anyone.

16 It is your duty to consult with one another  
17 and to deliberate to reach an agreement, if possible.  
18 Each of you must decide the case for yourself, but only  
19 after a fair and impartial deliberation of the evidence  
20 with your fellow jurors. During your deliberations, do  
21 not hesitate to reexamine your own opinions and change  
22 your mind if you are convinced that you were -- that you  
23 were wrong. But do not give up your honest beliefs  
24 about the weight or effect of the evidence because of  
25 the opinion of your fellow jurors, or for the mere

1 purpose of returning a verdict, or in the hopes of  
2 simply expediting the end of the trial. Remember, your  
3 duty is to decide whether the Government has proved each  
4 Defendant's guilt beyond a reasonable doubt.

5 Now I will give you the Instructions of what  
6 you should do when you go to the jury room. First, you  
7 should select one of your fellow jurors to -- as your  
8 foreperson. The foreperson will help guide your  
9 deliberations and will speak for you here in the  
10 courtroom.

11 Next, a verdict form has been prepared for  
12 your convenience. The verdict form is attached to the  
13 jury charge, ladies and gentlemen. The foreperson will  
14 write the unanimous answer of the jury, either guilty or  
15 not guilty, in the space provided on the form. After  
16 your deliberation -- deliberations, the foreperson  
17 should date and sign the verdict.

18 Ladies and gentlemen, I'm not going to read  
19 the verdict form, but as that paragraph indicates, there  
20 are 25 questions to this verdict form. Each one has a  
21 blank that must be filled in, guilty or not guilty,  
22 based upon your vote, unanimous vote, I should say, and  
23 at the very end on the last page there is a -- also a  
24 blank for the jury foreperson to sign.

25 If you need to communicate with me during

1 your deliberations, the foreperson should write out the  
2 message and give it to the Marshal. I will either reply  
3 in writing or bring you back into the courtroom to  
4 answer your message.

5 And ladies and gentlemen, I'm going to add a  
6 further admonishment on that. For the vast majority of  
7 questions that the Court receives from a jury, and I'm  
8 not telling you not to ask questions if you feel it's  
9 necessary, but in the vast scenarios, the majority of  
10 scenarios, the Court will give you a very frustrating  
11 answer that says, ladies and gentlemen of the jury, I  
12 cannot answer your question, please refer back to the --  
13 the Charge of the Court and/or the exhibits and go back  
14 to your deliberations.

15 It's a standard answer that's printed out  
16 that I give in most instances, but there are occasions  
17 where there are questions that can be answered, for  
18 example, if an assistance, or a lack of an exhibit or  
19 what have you. But I do give you that admonishment that  
20 be cautious with the type of questions you ask, but feel  
21 free to do so if you feel it's necessary.

22 And then finally, please keep in mind that,  
23 until you have reached a unanimous verdict, you should  
24 not reveal to any person, not even to me, how the jury  
25 stands, numerically or otherwise.

1           Ladies and gentlemen, that concludes the  
2 written Instructions as to the Charge of the Court, or  
3 the final jury Instructions. I am going to add some  
4 miscellaneous issues because of the fact that we have  
5 two alternate jurors.

6           As to the two alternate jurors, technically  
7 you're still on duty, but you will not be part of the  
8 deliberations. So technically, you will be in recess  
9 and will be called back only in the event that one of  
10 the jurors becomes incapacitated and is not able to  
11 proceed with the deliberations. In that event, one of  
12 you would be called and then you would step in for the  
13 juror. So I give that instruction to the two alternate  
14 jurors.

15           In addition, I'm going to give you some  
16 further Instructions. Obviously, it's now close to  
17 5:00, and as I've already said, you are the sole judges  
18 of the facts in this case, but you also are going to be  
19 the judges of how you deliberate.

20           You shall keep your time as you deem  
21 appropriate. You decide when to recess. You decide  
22 when to show up in the morning, when to leave in the  
23 afternoon. There's no way for me to predict how long  
24 your deliberation will take, so, again, you must guide  
25 yourselves in that. I am not going to be going into the

1 jury room and saying, ladies and gentlemen, you're free  
2 to take a recess.

3 I do know it's close to 5:00 and I'm  
4 assuming you'll want to take a recess for the day, but  
5 you're free to show up tomorrow at the time you agree  
6 upon. Technically, the courtroom does open by 8:00.  
7 Technically, if you want to work past 5:00, we need to  
8 make arrangements with security for that, but, again,  
9 any decision you make as to what time you want to show  
10 up, or what time you want to leave is up to you.

11 As I told you before on a different  
12 miscellaneous matter, now that you begin your  
13 deliberations, if you decide to have a working lunch,  
14 the Government can provide food for you for a working  
15 lunch, if that's a decision you make. Or,  
16 alternatively, as I've already, you're the judges of  
17 your time, if it you want to break for lunch, you get to  
18 decide how long you get to break for lunch.

19 Ladies and gentlemen, that concludes my not  
20 only Instructions in the written form, but the  
21 miscellaneous additional Instructions.

22 Do the alternate jurors have any questions?  
23 Back to my point, they're free to go. Once you all  
24 decide what time you want to leave, that's the only  
25 caveat as to the remainder of you.



1                   With that said, you're now in recess and,  
2                   again, you're free to begin initial deliberations and/or  
3                   leave for the evening if you should so desire.

4                   Please begin your deliberations. I'm  
5                   handing the signed and executed final jury Instructions  
6                   that I have signed to Ms. Sandra. The Marshal will take  
7                   it to the jury room and you will begin your  
8                   deliberations as instructed and as you deem appropriate  
9                   with your schedule.

10                  COURT OFFICER: All rise for the jury.

11                  (JURY OUT.)

12                  THE COURT: Thank you, everyone.

13                  Ladies and gentlemen, please be seated. We  
14                  are in recess. Thank you very much.

15                  (COURT IN RECESS.)

16

17                                   REPORTER'S CERTIFICATE

18

19                  I certify that the foregoing is a correct transcript  
20                  from the record of proceedings in the above-entitled  
21                  matter.

22

23

24

25

/s/Sheila E. Perales.  
SHEILA E. HEINZ-PERALES CSR RPR CRR  
Exp. Date: January 31, 2021